91-1562

No. _____

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In The Supreme Court of the United States October Term, 1991

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.
Petitioner,

v.

KELLY MERK, et al.,
Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. In an action under Section 301 of the Labor-Management Relations Act, does federal law invalidate an oral understanding that was a key component of a collective bargaining agreement, because that understanding was not disclosed during the membership ratification process?

2. In an action under Section 301 of the Labor-Management Relations Act, alleging defects in the union's ratification process, may the court invalidate an oral understanding that would have conferred a substantial benefit on the employer and that was a crucial component of a collective bargaining agreement, while enforcing other provisions of that agreement against the employer?

3. May a court of appeals overturn a judgment based upon a jury verdict without determining, on the basis of the record, that no rational jury could have reached that verdict?

4. Where a union is pressing a grievance on behalf of an entire bargaining unit, does the termination of employment of some members of that unit during the pendency of the grievance extinguish the union's duty of fair representation to them, and may they maintain a breach of contract action under Section 301 solely against their former employer despite a settlement of the grievance reached by the union and the employer?

5. In a Section 301 action seeking to invalidate a key oral portion of a collective bargaining agreement on grounds that the means adopted by the parties to form the agreement were improper, do the principles of *Del Costello* require the application of a federal six-month limitations period rather than a state's statute of limitations for breach of contract actions?

LIST OF PARTIES

The parties to the proceedings below and in this Court are Petitioner Jewel Food Stores, a division of Jewel Companies, Inc. ("Jewel") (American Stores Company is the parent corporation of Jewel); Respondents Kelly Merk, Joseph Staszewski, Vicki Menagh, Donna McCormick, David Therkield, John Malone, Marlene Wagner, Michael DeMare, Wayne Volker, Eleanore Collins, Andrew Kachik, and Patricia Todd (all of whom purport to represent a certified class of certain union employees who left Jewel's employment during a specified period) ("Respondents" or "Plaintiffs"); and Respondent United Food Commercial Workers International Union, AFL-CIO, Local 881 ("Local 881" or "Union").

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OPINIONS BELOW

Petitioner seeks review of two decisions of the Court of Appeals. One is reported at 848 F.2d 761 (7th Cir. 1988) ("*Merk I*") (Appendix A, pp A-1 to A-13); the District Court's opinion is reported at 641 F.Supp. 1024 (N.D. Ill. 1986) (Appendix C, pp C-1 to C-26), and this Court's denial of an interlocutory petition for a writ of certiorari is reported at 488 U.S. 956. The second Court of Appeals' decision is reported at 945 F.2d 889 (7th Cir. 1991) (Easterbrook, dissenting) ("*Merk II*") (Appendix B, pp B-1 to B-34); the District Court opinions are reported at No. 85 C 7876 (N.D. Ill. April 27, 1990) (1990 WL 71027) (Posner, sitting by designation) (Appendix D, pp D-1 to D-20) and at 734 F.Supp. 330 (N.D. Ill. 1990) (Posner, sitting by designation) (Appendix E, pp. E-1 to E-5).

JURISDICTION

The judgment in *Merk I* was entered on May 31, 1988, and Jewel's timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on June 27, 1988. This Court denied an interlocutory petition for a writ of certiorari on November 14, 1988.[1]

The judgment in *Merk II* was entered on September 27, 1991. Jewel's timely Petition for Rehearing was denied on December 20, 1991, and on the same date its timely Suggestion for Rehearing In Banc was denied by a five to five vote. Petitioner invokes the jurisdiction of this Court under 28 U.S.C.S. § 1254(1) (Law. Coop 1988).

STATUTES INVOLVED

This case involves Sections 203(d) and 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C.S. 173(d), 185(a) (Law. Coop 1988); Sections 9(a) and 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C.S. 159(a), 160(b) (Law. Coop 1988); and FED. R. CIV. P. 50. Appendix J, pp. J-1 to J-4, contains the texts of these statutes.

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[1] Denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from a final judgment. Stern, Grossman, Shapiro, *Supreme Court Practice* 226 (6th Ed. 1986).

STATEMENT OF THE CASE

This case arose from the efforts of Jewel and Local 881 in January, 1983, to avoid a strike after their negotiations for a renewal collective bargaining agreement had deadlocked. At the eleventh hour, they reached an agreement which included several oral understandings that the parties, in accordance with their past practice and at the insistence of Local 881, agreed to omit from the written portion of their collective agreement.

The key oral understanding was that Jewel dropped its demand for a "most favored nation" clause (permitting a wage reduction by Jewel if the union agreed to lower wages for any of its competitors); in exchange, Local 881 agreed to an economic reopener (including the availability of the traditional economic weapons of strike and lockout) during the term of the three-year agreement, if a cut-rate competitor entered the Chicago market.

Local 881 insisted that the understanding about the reopener remain oral in order to avoid criticism from its International. (*See* App. D at 2-5). Without disclosing the reopener to its general membership,[2] Local 881 arranged for membership ratification of the new agreement and advised Jewel in March, 1983 that ratification had occurred.

Subsequently, the cut rate competitor entered the market, and Jewel invoked the reopener. After bargaining for seven sessions between December 15, 1983 and February 1, 1984, Local 881 suddenly denied having ever agreed to a reopener. Bargaining soon reached impasse. On February 24, 1984, after giving appropriate notice to the union, Jewel implemented its final wage cut proposal. Local 881 filed a written grievance on February 17, 1984, an unfair labor practice charge on February 22, 1984, and a breach of contract suit on February 23, 1984, seeking restitution of all pay cuts for all affected employees, including Respondents herein (who were employed by Jewel at that time). In June, 1985, Jewel and Local 881 agreed to both a new multi-year labor agreement and a settlement of all outstanding actions. Under that settlement, which was ratified by the Local 881 membership, Jewel paid all those still on the payroll on June

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[2] However, several bargaining unit members were part of the negotiating committee and were informed of the reopener. Stip. Uncon. Facts, ¶25

21, 1985, most — but not all — of the wages it had previously cut. That settlement did not provide for any payment to employees no longer working for Jewel, a group that included many individuals who were initially hired during the fourteen-month period between Jewel's wage cuts and the June 21, 1985 settlement. The NLRB approved that settlement, finding that it effectuated the purposes of the NLRA with respect to all the affected workers, including those who had left employment prior to settlement (that is, including the class of Plaintiffs in the instant case). *See* Appendix M at 4-6.

Thereafter, a former employee and a member of the Respondents' class filed two separate unfair labor practice charges: one challenging the settlement itself and another alleging that the Union had not fairly represented former employees in negotiating it. The NLRB's Regional Director dismissed them both.

On September 10, 1985, Respondents filed a "hybrid" suit under Section 301, LMRA, against Jewel for its alleged breach of contract and against Local 881 for its alleged breach of the duty of fair representation. Later, Respondents added a "straight" breach of contract count against Jewel. Judge Aspen, granting Local 881's motion for summary judgment, held that the Union had no duty of fair representation to former employees, and, consequently, that its settlement with Jewel could not have violated any duty to them. In an interlocutory appeal, the Seventh Circuit sustained both that holding [848 F.2d 761 (7th Cir. 1988)] and the holding of the District Court (which had applied Illinois' five-year statute for breach of an oral contract) that this action against Jewel had been timely. This Court denied certiorari, 488 U.S. 956 (1988).

A jury trial on the breach of contract claim resulted in a verdict and judgment for Jewel. Circuit Judge Posner, sitting by designation as the trial judge, denied Respondents' motion for judgment notwithstanding the verdict or for a new trial. A panel of the Seventh Circuit reversed that judgment (Easterbrook, J., dissenting). Jewel's Petition for Rehearing was denied by the panel on December 20, 1991. Jewel's Suggestion for Rehearing In Banc was denied on the same date by a 5-5 vote of the Seventh

Circuit judges. Judge Posner, whose decision as trial judge had been reversed by the panel, cast no vote on the Suggestion for Rehearing In Banc.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, INVALIDATING AN ORAL UNDERSTANDING THAT WAS AN INTEGRAL PART OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, CONFLICTS WITH THIS COURT'S PRINCIPLES, AND WITH THE DECISIONS OF OTHER CIRCUITS AND OF THE NLRB, WHICH HONOR COLLECTIVE BARGAINING AGREEMENTS DESPITE DEFECTS IN RATIFICATION PROCEDURES

It is undisputed and indisputable that a collective agreement may properly include an understanding that, under specified conditions, the agreement could be reopened for negotiations and possible wage reductions mid-term.[3] Furthermore, the Court of Appeals properly recognized that the parol evidence rule, on which the Plaintiffs had relied, did not bar evidence regarding the oral reopener agreement. (945 F.2d at 893, App. B at 8) That court, however, in declining to permit proof of the oral reopener, reasoned that:

> collective bargaining agreements must be more secure than garden variety contracts. Accordingly, . . . *national labor policy* forbids introduction of prior or

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[3] *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). [Employer and Union have the power to make new and different contractual arrangements mid-term.] Thus, contrary to the Seventh Circuit's assertion in *Merk II*, 945 F.2d at 896, App. B at 12, that "Union members who reasonably believed that they were guaranteed a fixed rate of pay for the duration of the CBA unexpectedly found their wages slashed at mid-term," this Court's decisions have made it clear that any belief that a wage provided for in a written contract is immutable for the duration of that contract would not be reasonable.

> contemporaneous secret agreements to contradict fundamental terms of a ratified collective bargaining agreement.

Merk II, 945 F.2d at 894, App. B at 8-9 [Emphasis added].

The approach of the court below, which imposed more, rather than less, formality on the parties in collective bargaining perverts "national labor policy", as announced by this Court. Furthermore, by restricting the flexibility of unions and employers to deal creatively with difficult issues, the Seventh Circuit's approach significantly increases the risks of instability and bargaining impasses leading to strikes. As this Court observed long ago, the collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The special nature of collective bargaining agreements means that they are not "governed by the same old common-law concepts" that control private contracts. *Transportation-Communication Employees Union v. Union Pacific Railroad*, 385 U.S. 157, 160-61 (1966). On the contrary, their interpretation *necessitates* consideration of other agreements, practice, usage and custom. *Id.*

By subjecting ratified labor agreements to stricter scrutiny than "garden variety contracts", the court below also rejects the standards adopted by other courts of appeal. Thus, the Third Circuit has ruled that "where a court is called on to interpret a collective bargaining agreement it is generally appropriate for the court to look beyond the face of the collective bargaining agreement." *Southern Pennsylvania Transportation Co. v. Brotherhood of Railroad Signalmen*, 882 F.2d 778, 784 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). *See also International Union, United Mine Workers v. Racho Trucking Co.*, 897 F.2d 1248, 1254 (3d Cir. 1990).

The Fifth Circuit has similarly declared that "[f]ollowing the lead of the Supreme Court, this Circuit and others have refused to apply contract-law concepts, such as the parol evidence rule, to collective bargaining agreements." *Manville Forest Products Corp. v. United Paperworkers International Union*, 831 F.2d 72, 75 (5th Cir. 1987). The Ninth Circuit and the D.C. Circuit have

reached similar results.[4] Previously, even the Seventh Circuit had expressed the view that the parol evidence rule should not operate to defeat the intention of the parties in collective bargaining and should recognize supplementary understandings, oral and written. *See Mohr v. Metro East Mfg. Co.*, 711 F.2d 69, 72 (7th Cir. 1983). In contrast, the decision below invokes a 1945 Sixth Circuit case which has "vanished without a trace" as a source of precedent. *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945), discussed in *Merk II* (Easterbrook, J. dissenting), 945 F.2d at 902, App. B. at 25-26.

In its treatment of the parol evidence rule, the court below departs from the views of this Court and various courts of appeals concerning both the flexibility essential for the bargaining process and the broad frame of reference that should inform the interpretation of collective agreements. The importance and prevalence of oral understandings, *See* A. Cox, et al., *Labor Law, Cases and Materials* 741 (11th Ed. 1991), and the intercircuit differences regarding the applicability of the parol evidence rule to collective bargaining agreements strongly support this Court's review of the decision below.

Even more deserving of this Court's scrutiny is the Seventh Circuit's announcement of a new rule of public policy controlling the terms of labor contracts. According to that rule, "national labor policy" forbids the enforcement of a "secret" term (*i.e.*, an oral term not disclosed during ratification), which affects a "fundamental term" of the collective bargaining agree-

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[4] The Ninth Circuit has held that "[i]n discerning intent, the court may look to evidence outside the four corners of the document, such as the circumstances and negotiations of the parties in making the contract." *Sepulveda v. Pacific Maritime Association*, 878 F.2d 1137, 1139 (9th Cir. 1989), *cert. denied*, 493 U.S. 1002 (1989). *See also IBEW Local 47 v. Southern California Edison Co.*, 880 F.2d 104, 107 (9th Cir. 1989) ("This circuit has noted that this general principle of contract law applies with even greater liberality in disputes regarding collective bargaining agreements.") *Accord, United Mine Workers of America 1950 Benefit Plan and Trust v. Bituminous Coal Operators Association*, 898 F.2d 177, 181 (D.C. Cir. 1990).

ment.[5] Under the banner of "national labor policy", the court also assumes the power to create and enforce a new agreement for the parties by simply erasing the key oral understanding that had paved the way for their overall agreement.

In nullifying the parties' own agreement, the decision violates the mandate of this Court in *United Paperworkers v. Misco*, 484 U.S. 29 (1987). *Misco* reaffirmed the principle that considerations of public policy may preclude enforcement of collective bargaining agreements *only* where the contract would violate:

> 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests'

Misco, 484 U.S. at 43, *citing W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983) and *Muschany v. U.S.*, 324 U.S. 49 (1945). The decision below fails to identify any specific law or precedent that is contravened by the reopener agreement or its nondisclosure.

By substituting an agreement of its own making, the court below also ignored this Court's repeated admonitions against ad hoc governmental interference with the private bargaining system that the NLRA was designed to foster and protect. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). "[I]t was never intended that the Government would . . . step in, become a party to the negotiations and impose its own views of a desirable settlement." *Id.* at 103-04. *See also NLRB v. Insurance Agents*, 361 U.S. 477, 487-90 (1960).

The root of the Court of Appeals' willingness to disregard the basic presuppositions of our bargaining system appears to have been the mistaken notion that all written and significant provisions of a collective bargaining agreement are disclosed

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[5] The Seventh Circuit errs when it asserts that "[n]o one disputes that the oral reopener was, at the behest of Union officials, deliberately concealed from the union membership." 945 F.2d at 895, App. B at 11. The record [App. D at 2-5] showed that the local union wished to avoid revealing the reopener agreement to its International, that this goal could best be achieved by keeping the agreement oral, and that a number of bargaining unit members (those on the bargaining committee) were informed of the reopener.

during ratification. The misapprehension is evidenced by the court's use of emotionally charged terms such as "secret" in order to tie the oral nature of the reopener agreement to the union's failure to disclose it during ratification. But there is no guarantee that even a written contractual provision will be disclosed to the membership during ratification. Indeed, the union never gave employees copies of the written portion of the agreement for study before previous ratification votes. It simply provided its own summary of the points it deemed salient. *See Merk II*, 945 F.2d at 904-05, App. B at 30-31. Nor did the union's constitution prescribe the nature and extent of information to be provided before ratification. Congress might decide to require that bargaining unit members be provided perfect information prior to ratification, but Congress has not done so. *Merk II*, 945 F.2d at 900, App. B at 22-23 (dissenting opinion). The labor laws do not require unions to conduct any contract ratification at all, let alone prescribe the extent of required disclosure.

A recent Ninth Circuit decision displays a sharply different and more realistic view of the ratification process than that articulated by the Seventh Circuit. *Ackley v. Western Conference of Teamsters*, Nos. 90-55438, 90-55702 (9th Cir. February 21, 1992) (1992 WL 28993), Appendix O. In *Ackley*, two union members objected to the Teamsters' refusal to disclose any changes in non-economic terms of the collective bargaining agreement prior to ratification. The court declared:

> [u]nequal access to information is as inherent in the structure of the collective bargaining system as it is in our larger democratic system. [citations omitted] Union leaders, by virtue of their status as collective bargaining representatives, necessarily possess more information about the progress and projected outcome of collective bargaining than union members. At the time of a ratification vote, the officials will inevitably know more about the final terms of the new agreement than the rank-and-file members. This would be the case even were we to require advance distribution of the entire agreement. . . . To attempt to ensure equal information for negotiators and members alike would be wholly unrealistic [citation omitted]. . . .

Ackley, Nos. 90-55438, 90-55702, slip op. at 1764, App. O at 20. In contrast, the opinion below represents an attempt to bring about an equality of information for employees that is unattainable. *See Merk II*, 945 F.2d at 898, App. B. at 18.

The Ninth Circuit's *Ackley* opinion demonstrates clearly that interference with the collective bargaining process by decisions such as the one below, could be detrimental to unions, employers, and employees, for there is a tri-partite interest in the stability of labor-management agreements. Furthermore, judicial supervision of the details of the ratification process in an attempt to ensure equal information for negotiators and rank-and-file could easily subvert the union's statutory role as bargaining agent. *Ackley*, Nos. 90-55438, 90-55702 slip. op. at 1765, App. O at 21.

By obligating employers to monitor the ratification process and holding the validity of the contract hostage to that process, the decision below also conflicts with the National Labor Relations Board's long settled and firm view, a view which most other circuits have upheld. The NLRB has consistently held that an employer lacks standing to question whether a union's ratification procedure satisfied the union's constitution. "[I]t is for the Union, not the employer, to construe and apply its internal regulations relating to what would be sufficient to amount to ratification." *M&M Oldsmobile*, 156 NLRB 903, 905 (1966). Moreover, "as a matter of law, it is none of the Employer's business how (or even whether) the [union] obtains the employees' approval of the Employer's offer." *McLaughlin & Moran, Inc.*, 299 NLRB No. 7, 134 LRRM (BNA) 1217, 1218 (1990).

> To hold otherwise . . . would create the prospect of 'protracted litigation regarding the union's compliance with its own procedures', thereby encouraging industrial instability.

Beatrice/Hunt-Wesson, 302 NLRB No. 30, 137 LRRM (BNA) 1075, 1077 (1991), *citing M & M Oldsmobile, supra*.

The Board has been equally steadfast in its view that a union's failure to follow a self-imposed ratification requirement cannot affect the enforceability of the agreement. "Once union

representatives manifest final assent to a particular agreement, a binding contract is created. . . ." *Beatrice/Hunt-Wesson*, 137 LRRM (BNA) at 1076 (Stephens, concurring).[6] To be sure, employers, unions and dissident employees have sought to repudiate a ratified collective bargaining agreement on grounds of defective ratification. *See Id.* at n.1 ("The issue has arisen with some frequency"). But the NLRB has rejected such attacks on enforceability, refusing even to consider allegations that:

> the union's ratification procedures were not in accordance with the requirements of its constitution and by-laws, *Newtown Corp.*, [280 NLRB 350 (1986), *enf'd* 819 F.2d 677 (6th Cir. 1987)]; *North Country Motors*, [146 NLRB 671 (1964)], or that the ratification vote was tainted by procedural defects, *Martin J. Barry Co.*, [241 NLRB 1011 (1979)], or even that the union coerced its members into voting for ratification, *Utility Tree Service*, 218 NLRB 784 (1975), *enf'd* 539 F.2d 718 (9th Cir. 1976).

Mclaughlin & Moran, Inc., 134 LRRM (BNA) at 1219.

The Board has not permitted an employer to question the union's selection of the matters to be presented at ratification or the manner of presentation, much less required an employer to do so. The Board has been properly concerned that endless litigation or controversy about ratification details at contract termination, when no-strike clauses are generally ineffective, would obstruct agreement and frustrate the national interest in industrial peace.

Under this Court's ruling in *Textile Workers Union v. Lincoln Mills* 353 U.S. 448 (1957), the Court of Appeals should have given considerable weight to the NLRB's consistent decisions regarding ratification, decisions that have been upheld in the Fourth, Sixth,

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[6] *Cf. Beatrice/Hunt-Wesson, supra* 137 LRRM at 1079. [Employer may inquire into manner of ratification only where the union expressly waives "its right to define the terms of ratification and adequate compliance with them." (Stephens, concurring)]

Ninth and Eleventh Circuits.[7] *See also San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-3 (1959). The Seventh Circuit, however, discounted the Board decisions and the strong reasons that support their insulation of collective agreements from attacks based on defects in union-created ratification requirements.

The Seventh Circuit's view also ignores the realities of both the bargaining and ratification process. In bargaining, a union must reconcile a wide variety of divergent interests among the employees it represents:

> When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. . . .

Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 24-25 (1958). Typically, in negotiations each side wins some points, loses others, and reaches compromise positions on still others. During ratification, a union is eager to present the total package to its membership in the most favorable light. As the "highlights" of a particular agreement are presented, the high points often outshine the low points, compromise may be depicted as victory, and unpalatable contingencies (like the reopener agreement) which may never ripen may not be mentioned at all.

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[7] *See e.g.*, Agreement enforced against employer despite ratification issues: *Williamshouse-Regency of Delaware, Inc.*, 297 NLRB No. 26 (1989), *Consumat Systems*, 273 NLRB 410 (1984); *Seneca Environmental Products*, 243 NLRB 624 (1979); *Mt. Airy Psychiatric Center*, 230 NLRB 668 (1977); *Hickory Farms of Ohio*, 222 NLRB 418 (1976), *enf'd*, 558 F.2d 526 (9th Cir. 1977); *C&W Lektra Bat Co.*, 209 NLRB 1038 (1974); *M&M Oldsmobile*, 156 NLRB 903 (1966); and NLRB cases cited *supra*. Agreement enforced against union despite ratification issues: *McLaughlin & Moran, Inc.*, 299 NLRB No. 7 (1990); *Teamsters Local 100 (Duro Paper Bag)*, 216 NLRB 1070 (1975), *enf'd.*, 532 F.2d (6th Cir. 1976), *cert. denied*, 429 U.S. 859 (1976); *Elevator Constructors Local 8 National Elevator*, 185 NLRB 769 (1970), *enf'd* 465 F.2d 974 (9th Cir. 1972). *See also Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208 (6th Cir. 1967); *NLRB v. Darlington Veneer Co.*, 236 F.2d 85 (4th Cir. 1956).

Reality is that "[a] union may be willing to enter into an agreement that it believes is in the best, long-term collective interests of union members but that may not enjoy their immediate, widespread support." *Beatrice/Hunt-Wesson*, 137 LRRM at 1078 (Stephens, concurring), and that a union may, in good faith, adjust its ratification presentation accordingly. Challenges to ratification based on union constitutions or practices may involve not merely non-disclosure issues but a host of other issues such as: Was the membership given adequate time to study proposals, and then to debate them? Was there adequate disclosure of ambiguities and of matters relevant to their resolution, including informal understandings and past practices? *See Ackley*, Nos. 90-55438, 90-55702 slip op. at 1765, App. O at 22.

Whatever the merits of regulating such sensitive interaction between unions and their members, the Board and many courts of appeal have recognized that an employer is not the appropriate monitor. The Seventh Circuit has ignored these decisions and the strong reasons behind them. Instead, it has imposed unprecedented responsibilities on employers for union defects in the ratification process and has also imposed a novel and unwarranted sanction on the employers — destruction of their crucial contract rights. The Seventh Circuit's view cannot be reconciled with the view of the Ninth Circuit and the National Labor Relations Board.

II. THE COURT OF APPEALS' SELECTIVE AND UNWARRANTED NULLIFICATION OF THE ORAL CONTRACT PROVISIONS DIMINISHES THE NECESSARY FLEXIBILITY OF COLLECTIVE BARGAINING AGREEMENTS AND UNDERSCORES THE INTERCIRCUIT CONFLICTS CONCERNING THE PROPER REMEDIES FOR DEFECTIVE UNION RATIFICATION PROCEDURES

The Seventh Circuit's approach to allegations of defective ratification disregards the risks, pressures and realities of collective bargaining, as illustrated by this case. Jewel bargained for a most favored nations clause to protect its competitive position, but at the last minute, agreed with the union's proposed compromise of a conditional oral reopener. That reopener was

a crucial part of the parties' agreement. Furthermore, it did not by its own force contradict or change any of the conditions of employment; the consequences would depend on the market variables operative when and if the reopener was exercised. The employer, as Judge Easterbrook shows, might have sought to protect its competitive position through means other than the conditional reopener. 945 F.2d at 905, App. B at 32-33. The results of such hypothetical efforts cannot now be determined. What is, however, clear now is that by agreeing to the reopener, the parties avoided a strike, and thereby served the national, as well as their own, interest in industrial peace.

The Seventh Circuit's response to the attack on that reopener based on defects in the ratification process is destructive of both the flexibility necessary for effective bargaining and the stability of resulting agreements. To be sure, the court would apply its rule of nullification only if "substantial terms" or "fundamental terms" of the labor agreement had not been disclosed during ratification. But negotiators who seek to avoid a strike by creative compromises negotiated in an atmosphere of rush and crisis, should not be faced with the prospect that all or part of their agreement will be nullified if a court disagrees with their assessment of significance years later. See 945 F.2d at 905, App. B at 32. Similarly, the Seventh Circuit relies on a slippery and elusive notion of "benefit" in distinguishing "an unratified provision" of the 1969 collective bargaining agreement between these parties. The crucial difference, in the Seventh Circuit's view, was that the earlier unratified reopener "furthered the interest of all parties." 945 F.2d at 897, App. B at 14. There is no contention that the union did not believe that the 1983 strike-avoiding reopener would have the same effect.[8]

The calculus regarding "fundamental" and "benefits" that the Seventh Circuit would require of negotiators trying to avoid or to end a strike would breed considerable uncertainty — as that court's internal divisions made clear. For example, an employee who loses a job and all wages might well consider seniority even more fundamental than a reduction in wages. The

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[8] Viewed without benefit of hindsight, the 1969 reopener might just as well have resulted, not in an agreed upon wage increase but an impasse and a strike, with its attendant risks to the firm and its workers.

uncertainties inherent in the Seventh Circuit's approach threaten the flexibility and problem-solving capacity of collective bargaining, which frequently has made use of undisclosed and unratified oral and written side agreements for unimpeachable ends.

The basic approach of the Seventh Circuit is inconsistent with the approach of and the results reached by other courts of appeals. It is fundamentally at odds with the Ninth Circuit's approach in *Ackley, supra*. In *Ackley*, individual plaintiffs also began by suing their employer (among others) under Section 301, alleging that the union's non-disclosure of certain items during ratification had violated the provision of the union's constitution that required contract ratification. Plaintiffs relied on Section 301 of the LMRA and alleged, *inter alia*, a breach of the union's duty of fair representation, and sought rescission of the contract allegedly subject to defective ratification.[9] The plaintiffs failed, however, to assert liability against the union, under Section 301(a) of the LMRA, for the breach of the union's contractual obligations to its members under the provisions of the union constitution. It was that failure that the Ninth Circuit emphasized in affirming the district court's dismissal of the action. *Ackley*, Nos. 90-55438, 90-55702 slip op. at 1749, App. O at 5.

In sharp contrast to the approach of the Seventh Circuit, *Ackley* emphasized the following points:

First, the primary means for redressing a violation of a member's right to disclosure under a union constitution is an action under Section 301 against the union for breach of contract. *See generally, Woodell v. IBEW*, ___ U.S. ___, 112 S.Ct. 494 (1991). *See also Lewis v. IBT*, 826 F.2d 1310 (3d Cir. 1987)

Second, "Statements made by union representatives during the contract ratification process furnish insufficient justification for invalidating a collective bargaining agreement unless a showing is made that but for those statements, the ultimate

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[9] Later the *Ackley* plaintiffs agreed to the dismissal of the defendant-employer and abandoned their claim for rescission in favor of a claim for a declaratory judgment.

outcome of the bargaining would have been different."[10] *Ackley*, Nos. 90-55438, 90-55702 slip. op. at 1762, App. O at 18. The court, moreover, acknowledged that the burden of such proof was so heavy that, in practice, ratification defects would not lead to denial of enforcement of collective bargaining agreements.[11] *See also Acri v. IAM*, 781 F.2d 1393 (9th Cir. 1986) (concurring opinion), *cert. denied*, 479 U.S. 816 (1986).

Third, before union members bring a lawsuit alleging a deprivation of their entitlements under a union constitution, they must first exhaust their internal union remedies.

Fourth, in describing the federal remedial framework for redressing a union's violation of its members' rights under a union constitution, the Ninth Circuit did not even refer to a breach of contract action under Section 301 against an employer.

The fundamentally inconsistent approaches of the two circuits cannot be explained away on the ground that in *Ackley* it was not alleged that the employer had known of the union's nondisclosure plan. That difference would not explain the failure of the Seventh Circuit to apply the strict prerequisites for rescission of collective bargaining agreements imposed by the Ninth Circuit. Nor would it explain the Seventh Circuit's failure to insist on exhaustion of internal union remedies by a union member before asking a court to determine whether a union's ratification procedures violated its members' rights under the union's constitution.

Additional uncertainties result from other appellate decisions dealing with the possible impact of defects in ratification on enforceability of collective bargaining agreements. Although those decisions did not deny enforcement to any contractual

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[10] There is no testimony in the record to support the Court of Appeals' passing reference to the reopener in this case later being voted down. *Merk II*, 945 F.2d at 897, App. B at 16. No such vote was ever taken.

[11] Although the Ninth Circuit imposed this burden on plaintiff employees suing their union, rather than their employer, the plaintiffs should bear no lighter burden in a lawsuit against their employer, seeking rescission. The employer, after all, would have no disclosure obligation during the ratification process, under the union constitution or otherwise. On the contrary the employer's intrusion in that process might well constitute an unfair labor practice.

provision, they left such a possibility open. *See e.g., Chrysler Workers Ass'n v. Chrysler Corp.*, 834 F.2d 573, 582 (6th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988); *Central States SE and SW Areas v. Kraftco, Inc.*, 799 F.2d 1098, 1112 (6th Cir. 1986), *cert. denied*, 479 U.S 1086 (1987). In *Chrysler*, employees challenged unratified secret side letter agreements which eliminated important transfer rights. The Sixth Circuit declared: "[w]e find that Chrysler had a right to rely upon its agreement with the Union absent clear notice that the Union was acting in bad faith against the interests of its members." *Cf. Anderson v. United Paperworkers Int'l. Union*, 641 F.2d 574 (8th Cir. 1981); *Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747 (3d Cir. 1977); *Deboles v. Trans World Airlines*, 552 F.2d 1005 (3d Cir. 1977), *cert. denied* 434 U.S. 837 (1977).

The district court in *Merk II* adopted the Sixth Circuit's formulation set forth in *Chrysler*. *Merk v. Jewel Food Stores*, No. 85 C 7876 (N.D.Ill. April 27, 1990), slip op. at 9, App. D at 9. The Seventh Circuit, sub silentio, rejected that formulation and thereby created another significant intercircuit difference impinging on important national values — private ordering of, and stability for, collective bargaining agreements.

Those values are also undermined by the Seventh Circuit's remedy: i.e., selective contract nullification. That remedy — unprecedented to our knowledge — erased a part of the agreement that the Seventh Circuit itself characterized as "fundamental" and that the district court properly found had paved the way for Jewel's agreement to a new contract. The Seventh Circuit did not even address the question of the divisibility of the agreement. Why, after the court invalidated the reopener, should the rest of the agreement be enforced against Jewel? *See generally*, 2 Farnsworth, *Contracts* 70 (1990), 3 Farnsworth, *Contracts* 50-51 (1990).

The Seventh Circuit's failure to address that question is related to its failure to consider the overall federal remedial framework for vindicating members' rights violated by their unions. Those failures resulted in an unjustified separation of culpability from liability. Thus, the Seventh Circuit concluded that nondisclosure of the oral understanding during ratification wronged the Respondents by denying them their rights under

the union constitution. If that nondisclosure was a wrong, Local 881, not the employer, devised and implemented it. By contrast, the employer had no duty to advise the union members regarding any of the terms, written or oral, of the collective agreement; nor did the employer have a right to participate in the ratification process. On the contrary, any attempts to do so would have undermined the union's status as the exclusive representative, and could have been treated as an unfair labor practice. *See, e.g., Teamsters, Local 281 v. McLaughlin & Moran*, 299 NLRB No. 7 (1990).

Plainly, Jewel was only a bystander with respect to any violation of Respondents' ratification rights while Local 881 had the paramount and exclusive responsibility under the union constitution and was the prime mover in any constitutional violation that occurred. Consequently, to exculpate Local 881 while subjecting Jewel to substantial liability would be manifestly unjust. Nonetheless, that is the perverse result of the course of this litigation.

That perverse result underscores the questions raised and approached so differently by *Ackley* and *Merk II*. What should be the primary federal remedy against alleged union breaches of duties to disclose when ratification of collective agreements is prescribed by the union constitution? What burdens should be imposed on those who would nullify collective agreements in whole or in part, on the basis of alleged default by the union of its duty to disclose during the ratification generally required by the union constitution? These questions implicate the basic values of the collective bargaining system and the appropriate distribution of responsibility between employers and unions for enforcement of union constitutions. We submit that the pertinent intercircuit differences regarding these questions warrant review by this Court.

III. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY BY OVERTURNING THE JURY'S VERDICT WITHOUT EXAMINING THE RECORD TO DETERMINE WHETHER NO REASONABLE JURY COULD HAVE REACHED THAT VERDICT

The Court of Appeals ignored this Court's established rules for reviewing the Plaintiffs' motion for a judgment notwithstand-

ing the verdict. Under the recent revision of Rule 50 of the Federal Rules of Civil Procedure, judgment may be entered contrary to a jury's verdict where "there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to [an] issue". Rule 50(a)(1), FRCP.[12] The reviewing court is not to evaluate the credibility of the witnesses, and all reasonable inferences are to be made in favor of the non-moving party. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 696 (1962); *Brady v. Southern Railway Co.*, 320 U.S. 476, 479 (1943). The plaintiff who has lost the verdict is not entitled to judgment "unless no rational jury could have brought back a verdict" for the defendant. *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 678 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986).

The circuit court never inquired whether there was any evidentiary basis for the jury's finding that the reopener agreement was enforceable despite the union's failure to disclose it during ratification. Instead of considering this issue *de novo*, the Court of Appeals limited its analysis to attacking Judge Posner's opinion in the district court, in which he had refused on both legal and factual grounds to overturn the jury's verdict. (*Merk II* at 896-99, App. B at 12-19)

A proper review would have taken into account any alternative routes by which the jury could have properly reached the verdict it did, not just the route noted by the trial judge. *Iacurci v. Lummus Co.*, 387 U.S. 86 (1967). Under the instruction given (*See* Appendix N), the jury's verdict that the reopener agreement was enforceable could have been based on any one of the following findings of fact:

(1) The plaintiffs failed to prove that the general ratification provision in the union constitution actually required disclosure of agreements such as the reopener;

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[12] *Merk II* was decided prior to the effective date of the revision to Rule 50, but the legal standard at that time was the same. As the notes of the Advisory Committee state:

> Paragraph (a)(1) . . . effects no change in the existing standard. That existing standard was not expressed in the former rule, but was articulated in long-standing case law.

(2) The plaintiffs failed to prove that Jewel understood that the general ratification provision in the union constitution required disclosure of agreements such as the reopener; or

(3) Jewel was entitled to rely on a past practice of incomplete disclosure by the union during ratifications.

The court below had an obligation to consider each of these possibilities in testing the jury's verdict. Only if the trial record would support none of these possible jury findings would the court below have been justified in disregarding the jury's verdict. It should be noted that even under the legal standard announced by the Court of Appeals, a jury verdict based on finding (1) or (2) above would support the verdict in Jewel's favor.

The Court of Appeals failed to make the analysis required under the court's own legal standard or the standards of the trial court. Accordingly, the court below could not properly have found the evidence insufficient to support the jury's verdict. Consequently, its reversal of the judgment entered on that verdict is inconsistent with the settled principles under Rule 50 of the Federal Rules of Civil Procedure and deprives Petitioner of its right to jury trial. *Cf. Neely v. Eby Construction Co.*, 386 U.S. 317 (1967).

Accordingly, even if this Court were to decide not to disturb the legal analysis underlying the decision below, this Court should order the court of appeals to analyze the evidence, giving proper deference to the jury's role. If the court of appeals finds that the jury was asked to consider the wrong questions, then it should order a new trial so a jury can consider the factual issues in the correct legal context.

IV. THE DECISION BELOW THAT A UNION DOES NOT OWE A DUTY OF FAIR REPRESENTATION TO FORMER EMPLOYEES AND CANNOT BIND THEM BY A GRIEVANCE SETTLEMENT IS A DESTABILIZING DEPARTURE FROM THIS COURT'S DECISIONS

Local 881, pursuant to its authority under Section 9(a) of the NLRA, agreed to a grievance and arbitration procedure which

granted to the Union the sole authority to process, settle, and arbitrate grievances arising out of the collective bargaining agreement. *See* Appendix K, pp. 2-4. That authority continued regardless of whether a grievant's employment with Jewel ended prior to the resolution of his grievance. *See Pennsylvania Railroad Co. v. Day*, 360 U.S. 548 (1959). The corollary of the union's continued authority was its continued duty of fair representation to former employees whose grievances had arisen under the agreement.[13]

Nonetheless, the Court of Appeals in *Merk I* affirmed the district court's finding that the union had no duty to represent Respondents once their employment with Jewel ended. That court reached the wrong result because it began with the wrong question; *i.e.*, whether the Respondents were "statutory employees"[14] when the Petitioner and the Union settled their grievances. The right question was whether Respondents' grievances, at the time they arose, were subject to the exclusive

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[13] *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville R. Co.*, 392 U.S. 192, 202 (1944) (the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power on their interest and behalf); *A.F.G.E. v. F.L.R.A.*, 812 F.2d 1326, 1328 (10th Cir. 1987) ("Fair representation means that when union uses a power which it alone can wield it must do so for the benefit of all"); *Bowen v. United States Postage Service*, 459 U.S. 212, 225 n. 14 (1983).

[14] The court below, because it ignored the context and reasoning of *Allied Chemical v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), concluded that that decision mandated the holding that the union did not represent former employees. *Pittsburgh Plate*, however, contains neither that sweeping declaration nor the mandate that the court below found in it. Rather, *Pittsburgh Plate* dealt with whether an employer had violated its duty to bargain by unilaterally offering retirees an opportunity to improve their collectively bargained health care benefits. In that context, this Court held that the retirees were not "statutory employees."

Respondents' status as "statutory employees" when their claims were settled is irrelevant here because their claims arose during their employment and, hence, were clearly governed by the grievance and arbitration procedures of the collective bargaining agreement. *Air Line Pilots Assoc. Intern'l. v. Alaska Airlines*, 735 F.2d 328 (9th Cir. 1984). Furthermore, even if Respondents' status as statutory employees were at issue, this Court has previously interpreted the much narrower definition of "employee" under the Railway Labor Act to include workers who have left their employment after initiating a claim for compensation for work performed on active duty. *Day*, 360 U.S. at 551-52

grievance and arbitration machinery established pursuant to the collective bargaining agreement. Plainly, the answer to that question is yes. There is no dispute in this case that Respondents were active employees when their grievances arose, subject to the contractually prescribed grievance arbitration procedure. Furthermore, Respondents' claims were, in fact, covered by the grievance filed by Local 881. *See* Appendix L.

Respondents' rights and duties under the grievance-arbitration process were not diminished merely because their employment with Jewel had ended. Hence, the claims of former employees — like those of Jewel's continuing employees — were subject to final resolution in the grievance-arbitration process. *See Day*, 360 U.S. at 551-553. Similarly, a former employee was required to exhaust contractual remedies before filing suit on a grievance that arose during his active employment. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53, 658-59 (1965).

Both former and present employees are protected by the duty of fair representation with respect to the final resolution of grievances arising during their employment. Absent a breach of the union's duty of fair representation, a union's final disposition of such grievances, whether through pre-arbitration settlement or arbitration, binds former employees to the same extent as current ones. *See Hines v. Anchor Motor Freight*, 424 U.S. 567, 570-72 (1976).

The Court of Appeals acknowledged, but failed to apply, the foregoing principles because it concluded that the former employees had not "assented" to Local 881's continued representation. *Merk I*, 848 F.2d at 766, App. A at 11. However, any such requirement of assent as a condition of Local 881's exclusive authority and its correlative duty to deal fairly with grievances would be wholly incompatible with this Court's settled position that former employees must exhaust their contractual remedies before bringing a lawsuit.

Furthermore, as this Court has long recognized, regardless of whether the grievants are current or former employees, resolving grievances through mandatory grievance procedures protects strong values central to the bargaining process. *See Day*, 360 U.S. at 551-53. *Cf. Republic Steel*, 379 U.S. at 656-59. Indeed,

in *Day*, this Court decried the destabilizing results of creating two classes of grievants: the first, current employees who would be subject to the grievance-arbitration process and the exhaustion requirement; and the second, former employees who could freely bypass such processes and file individual court actions. This division invites the unrest and instability caused by inconsistent disposition of claims. *Day*, 360 U.S. at 551-52. Consequently, overlapping arbitral and judicial remedies for grievances arising under the same collective agreement are incompatible with the central importance accorded to the parties' dispute-settling mechanisms by this Court's decisions in the "Steelworkers' Trilogy" (*United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960)), and which this Court reaffirmed in *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986).

Under *Day*, Local 881's duty of fair representation extended to the former employees. However, even if the union had been free to abandon such representation with respect to former employees, Local 881 did not do so here. On the contrary, it continued to represent former as well as current employees. Indeed, it negotiated the settlement with Jewel on the understanding that that settlement resolved all grievances, including Respondents'. The NLRB dismissed the Union's unfair labor practice charge against Jewel on the same basis. *See* Appendix M at 4-6. Under all those circumstances, the concomitant of the Union's continued representation of former as well as current employees was its duty of fair representation to members of both groups.

The court below erred in its failure to find that the union's duty of fair representation resulted from its assumption of authority to act for all the affected employees. That court concluded — erroneously, we submit — that the union lacked representative authority over the Respondents' grievances. Petitioner submits that such authority clearly existed but, in any event, the existence of a union's authority to act is not a necessary condition for activating its duty of fair representation.

Once the union undertakes the representation of workers, the duty arises. Indeed, the Third Circuit[15] has so held, and the Seventh Circuit's disregard of that principle brings it into conflict with that circuit. Respondents' recourse, if any, was not to question the Local's authority to settle grievances, but to urge that the terms agreed to by the union violated its duty of fair representation. The Court of Appeals below erroneously dismissed a claim alleging precisely such a violation because of its constricted and dysfunctional view of the scope of the duty of fair representation.

Even the Court of Appeals acknowledged the destabilizing effects of its decision, observing that "the proliferation of persons with authority to bargain on their own [as a result of its decision] will raise the cost of bringing the dispute to a conclusion . . . and the prospect of some ex-employees' suing and winning may make a union leery of compromising the claims of current employees." *Merk I*, 848 F.2d at 767, App. A at 12. Obviously, that prospect might also make an employer "leery" of putting its best offer forward if, after a settlement, former employees are free to seek more by litigation. Furthermore, such litigation, because it is controlled by persons without a stake in the relational interests safeguarded by grievance arbitration, poses substantial risks to those interests.

Under the Seventh Circuit's view, an arbitration award would presumably be no more final and binding on former employees than a settlement with the employer. If the union does not have the authority to represent former employees, and no corresponding duty to represent them fairly, an arbitration award would be no more binding on employees who ended their employment after the grievance arose and before the award was

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[15] *Koshatka v. Philadelphia Newspaper, Inc.*, 762 F.2d 329, 335 (3d Cir. 1985).

issued than would a pre-arbitration settlement.[16]

The unfortunate and significant consequences of the approach in *Merk I* are likely to arise frequently. Many disputes over the application of a collective bargaining agreement to particular employees are not resolved until after some of them have ceased their employment. Illustrative disputes are those over severance pay, health care provisions, sick leave, vacation, or seniority.

The decision in *Merk I* not only undermines the exclusivity of the grievance-arbitration machinery but it also places under a legal cloud established means of settling disputes over the terms of new agreements. For example, in negotiating renewal agreements, the parties frequently agree to pay increases, retroactive to the expiration of the prior agreement. Typically, such agreements grant such pay only to those working at the time of the settlement, thereby excluding former employees. *See, e.g., Larson v. Transit Authority*, 219 Neb. 539, 541, 364 N.W.2d 33, 36 (1985). *See also Buchholz v. Swift*, 609 F.2d 317, 325-27 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980) (upholding vacation pay settlement granting vacation pay only to employees employed on a certain date and excluding any payments to former employees). Such retroactive adjustments for current employees implicate the same concerns as did the settlement reached in this case.

By holding that the union had no duty of fair representation to former employees, the Seventh Circuit ignored clear and controlling precedent of this Court. By also holding that the union had not assumed a duty of fair representation by its actions, regardless of its legal authority to act, the Seventh Circuit is in conflict with other circuits. The destabilizing results of this

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[16] Apparently, the Court of Appeals accepted the "unsettling conclusion" of *Merk I* because of what Petitioner submits was a misunderstanding of its own litigation position. Contrary to the Court of Appeals' conclusion, Petitioner in *Merk I* asserted that Respondents had assented to representation by Local 881 by: (1) accepting employment at Jewel; and (2) allowing the underlying grievance to be filed and processed on their behalf by Local 881 up through and including settlement without any objection. Under this Court's decision in *Day* and *Maddox*, no further action by either Respondent or Local was needed to activate the union's authority and its concomitant duty of fair representation.

decision on labor relations and the intercircuit conflict it creates warrant review by this Court.

V. THE COURT OF APPEALS' CHOICE OF A 5-YEAR STATUTE OF LIMITATIONS FOR THIS CLAIM UNDERMINES THE NATIONAL LABOR POLICY IDENTIFIED BY THIS COURT IN *DEL COSTELLO*

The district court found that the instant action was timely under the Illinois five-year statute of limitations for breach of oral contract actions. 641 F. Supp. at 1036, App. C at 16. The Seventh Circuit in *Merk I* ruled that whatever the appropriate limitations period should be, it was longer than the six-month Section 10(b) period advocated by Petitioner. 848 F.2d at 762 n. 2, App. A at 3. That ruling is, however, contrary to the teaching of *Del Costello v. IBT*, 462 U.S. 151 (1983); it also illustrates the need for this Court to clarify the scope of the *Del Costello* principles, given that a decade of ad hoc adjudication by lower courts has produced disagreement and disarray.

Del Costello requires the court to analyze the nature of a Section 301 claim in order to determine the appropriate statute of limitations. If the claim amounts to a "straightforward" breach of a collective bargaining agreement, then it is most appropriate to borrow the most analogous state statute of limitations. *Del Costello, supra*, 462 U.S. at 162, *citing Autoworkers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). On the other hand, where a claim involves "those consensual processes that federal labor law is chiefly designed to promote — the formation of the collective bargaining agreement and the private settlement of disputes under it," then the need for uniformity and the need to maintain proper balance between stable bargaining relationships and finality of settlements and the interests of individual employees mandate the adoption of the six-month Section 10(b) limitations period. *Del Costello, supra* 462 U.S. at 171, *quoting Hoosier Cardinal, supra.*

The courts below erred by treating the dispute here as a "straightforward" breach of contract claim. In essence, this case has been an attack on the negotiation process used by the parties in 1983 to achieve a collective bargaining agreement and an attempt to alter that agreement by striking out the oral reopener.

The specific contention underlying that attack is that, in agreeing to the oral reopener and the overall collective agreement, the parties also agreed to keep the reopener "secret". Accordingly, this is not an action to redress a simple breach of contract; rather, it is a direct attack on the consensual bargaining processes that this Court in *Del Costello* sought to protect against belated attacks by adopting a uniform, national, six-month limitations period rather than permitting courts to borrow varying and sometimes lengthier analogous state statutes.

The reopener agreement was reached in 1983. The plaintiffs had reason to know of its existence, at the latest, in February, 1984, when Jewel reduced wages, claiming entitlement under the reopener agreement. Plaintiffs did not institute legal action until September 1985, more than two years after the challenged agreement had been reached, and after the end of the collective bargaining agreement's term. Even if Local 881's vigorous litigation on plaintiffs' behalf protesting the wage reductions tolled the running of the six-month period temporarily, it must have resumed running as plaintiffs quit the bargaining unit during the ensuing fourteen months. To permit so fundamental a challenge to the consensual bargaining process to gestate for five years or more would be "simply too long to allow industrial disputes to fester." *UFCW, Local 100A v. John Hofmeister & Son, Inc.*, 950 F.2d 1340, 1348 (7th Cir. 1991), *quoting Associated Brick Mason Contractors v. Harrington*, 820 F.2d 31, 37 (2d Cir. 1987).

Almost ten years after *Del Costello*, lower courts are still groping toward a coherent analytical framework for determining the proper limitations period for Section 301 actions. In *Merk I*, the Seventh Circuit borrowed a state five-year statute of limitations. On the other hand, in *Lewis v. International Brotherhood of Teamsters Local Union No. 771*, 826 F.2d 1310 (3d Cir. 1987), the Third Circuit felt obliged to adopt the six-month section 10(b) period in a case which implicated precisely the same fundamental bargaining interests as does the case at bar. *Lewis* was a suit by a union member against his local union for violating the international's constitution by failing to submit for membership vote an agreement allowing the employer to institute an absentee policy. The member argued for a four-year

state breach of contract limitations period, but the Third Circuit ruled that there was a sufficient "family resemblance" between the claim in *Lewis* (that the local had failed to protect the members' right to vote on local supplements) and the claim in *Del Costello*. The Court explained that "the heart of Lewis' claim is his disagreement with Local 771's acceptance of the absentee policy. This implicates the adequacy of the Local's representation of the members' interest with respect to the policy and may directly affect the bargaining relationship with the employer." *Id.* at 1316. That the period of repose for such similar challenges to the parties' collective bargaining actions can be six months in the Third Circuit and five years in the Seventh Circuit offends national labor policy.

Because of the national interests involved, challenges to the negotiation process should be subject to the same federal statute of limitations regardless of the nature of the challenge to contract formation. Failure so to direct will only increase the uncertainty wrought by the opinion of the court below. Labor stability will be jeopardized if labor agreements are subject to complete or partial nullification throughout, and even after, their term by one or many employees dissatisfied with the ratification process.

CONCLUSION

For all of the reasons set forth herein, Petitioner respectfully requests that review be granted on the Questions Presented at the outset of this Petition.

Respectfully submitted,

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(2)

91-1562

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States
October Term, 1991

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.
Petitioner,

v.

KELLY MERK, et al.,
Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 86-2723

KELLY MERK, et al.,

Plaintiffs-Appellees,

v.

JEWEL COMPANIES, INC.,

Defendant-Appellant,

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 7876—Marvin E. Aspen, *Judge.*

ARGUED OCTOBER 30, 1987—DECIDED MAY 31, 1988

Before FLAUM, EASTERBROOK, and MANION, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Jewel Companies, which operates a chain of supermarkets, reached a collective bargaining agreement with Local 881 of the United Food and Commercial Workers Union in September 1982. The agreement ran until June 1985. In December 1983 Jewel asked the Union to agree to a reduction in wages and benefits

notwithstanding the agreement. The Union refused. Jewel declared in February 1984 that an "impasse" had been reached and put its most recent proposal into effect. The result was a reduction of up to $1.25 per hour for about 18,000 employees.

Jewel claimed that it was entitled to reduce the hourly wage, notwithstanding the collective bargaining agreement, because it had an oral understanding with the Union that the question of wages would be reopened when a rival discount chain went into operation, which happened in the fall of 1983. The Union denied that it had made such a pledge and added that in its view an oral promise could not prevail over the written agreement. Its members overwhelmingly rejected a proposal to ratify the wage reductions. The Union invoked the arbitration clause of the agreement and asked the General Counsel of the National Labor Relations Board to issue a complaint charging Jewel with unfair labor practices. After Jewel refused to arbitrate the Union filed suit, and a district judge ordered Jewel to do so. The General Counsel eventually issued a complaint. Jewel was under the gun in two forums at once.

By then the collective bargaining agreement was nearing an end. Jewel and the Union tried to settle their dispute and reach a new agreement as a package. After hard bargaining they did so. Jewel agreed to restore most wages and benefits to the level provided in the 1982 agreement, retroactive to February 1984.[1] In June 1985 the Union's members ratified this agreement, roughly 80% voting in favor. The Union withdrew its request for arbitration, and at the joint request of Jewel and the Union the General Counsel dismissed the unfair labor practice charge. That dismissal is not reviewable. *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413 (1987).

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[1] The parties disagree about how close to full restoration and back pay this came. The dispute is not important for current purposes.

There was a catch. Only persons still employed on June 21, 1985, received back pay. Jewel takes the June 1985 agreement as a comprehensive settlement, extinguishing any rights of the 2,000 or so who retired, quit, or were fired between February 1984 and June 1985. The Union believes that the 1985 agreement, which is silent on the treatment of these employees, leave them to whatever devices they have under the 1982 agreement. In either case, Jewel was not making haste to give them cash, and the arbitration—which was within the Union's control—no longer offered them any prospects. Several of these former workers protested to the Labor Board's General Counsel, who ratified her decision to dismiss the complaint. They then filed this class action against Jewel and the Union, urging alternatively a breach of contract, reparable under §301 of the Labor-Management Relations Act, 29 U.S.C. §185, and a breach of the Union's duty of fair representation.

The district court granted summary judgment for the Union, concluding that it had no duty to represent—fairly or otherwise—persons no longer employed by Jewel at the time of the new contract. 641 F. Supp. 1024, 1027-32 (N.D. Ill. 1986). It could not breach a duty it did not owe. The tag-along "hybrid" contract/duty of fair representation claim against Jewel had to be dismissed as well. But the "straight" contract claim under §301 might have substance, the court thought, because Jewel paid the former employees less than the agreement specified. The Union, which was no longer the representative of the ex-employees, could not compromise their claims. The district court therefore denied Jewel's motion for summary judgment. It certified two questions under 28 U.S.C. §1292(b), and we accepted Jewel's interlocutory appeal.[2]

---

[2] Jewel also contended that the suit is barred by the statute of limitations. The district court disagreed, 641 F. Supp. at 1032-37. Shortly after the district court's decision, we held in *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d

(Footnote continued on following page)

In this court, as in the district court, the parties assume that unless the Union fairly represented the former employees, Jewel's motion for summary judgment was properly denied. Jewel contends that the Union represented all of its present and former employees; the Union denies that it owed any duty to the former employees (but insists that, if it did, it represented them fairly); the plaintiffs maintain that the Union did not represent them (and that it sold them down the river, showing that any representation was inadequate). The district court concluded that the Union faced a hopeless conflict of interest. The former employees, no longer members of the bargaining unit, could not vote against any compromise, so that the officers of the Union had nothing to lose and everything to gain by giving away the ex-employees' rights in exchange for larger payments for current employees. The court concluded that the Union did not have, and if it had did not discharge, a duty to represent the former employees fairly.

We have some doubt whether this is the right way to approach the question. Perhaps if the Union did not represent the ex-employees, that simply left them to the mercy of Jewel. The entitlements established by collective bargaining agreements do not survive their expiration or

---

[2] *continued*

222 (7th Cir. 1986), that "straight" §301 actions to enforce collective bargaining agreements would continue to be governed by the most analogous state statute of limitations, usually the period for breach of contract. The district court concluded that the most analogous period is given by Ill. Rev. Stat. ch. 110 ¶13-205, providing five years to sue on an oral contract. Whether five years or some other period is best, any period longer than 20 months is long enough to make this suit timely (it was filed in September 1985, and the claim arose no earlier than February 1984), and as Jewel does not suggest any period shorter than five years—other than the 90-day period for seeking arbitration and the six-month period now used for "hybrid" actions, both of which we rejected in *Home Elevator*, we agree with the district court that this suit is timely.

modification. So if, for example, the 1982-85 agreement had established a plan under which Jewel provided health benefits for its employees and retirees, the Union and Jewel would have been free to abolish those benefits for subsequent periods, even though the Union does not represent retirees. If the Union and Jewel had reached an impasse, Jewel would have been free to put into place its last proposal, which might not have included health benefits. *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988); *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311 (7th Cir. 1986); cf. *DeGeare v. Alpha Portland Industries, Inc.*, 837 F.2d 812 (8th Cir. 1988) (ERISA does not alter the rule of labor law in this respect). That the retirees had worked in earlier years in the expectation that they were receiving money today and health benefits later would not matter. Because of the time limit on the collective bargaining agreement, any subjective expectation they may have had is not enforceable. And the Union, which under *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), does not necessarily represent retired workers, may choose to negoitate an agreement that provides more for today's workers and less for retirees. This becomes effective against retirees on the employer's say-so; the lack of representation does not give the retirees rights greater than those provided in collective bargaining agreements. Perhaps Jewel and the Union could undo the expectations of ex-workers about wages, just as they could frustrate their expectations about health benefits and other deferred compensation (to the extent ERISA does not cause these rights to vest). The collective bargaining agreement, after all, is between the Union and the employer, not between the workers (with union as agent) and the employer. On this view the union and employer may modify "their" agreement and let the chips fall where they may. Perhaps too Jewel can be seen as having invoked in February 1984 a modification clause (albeit unwritten) of the collective bargaining agreement, just as it says, after which everyone got the contracted-for wage between February 1984 and June 1985; when in June 1985

the Union negotiated "back pay" this was in the nature of a bonus for existing employees (in lieu of higher future wages) rather than reparations for an established wrong. The Union had no duty to any former employee in June 1985, so these persons cannot complain that the Union did not get them a "signing bonus" too: they did not sign and did not agree to reduce their future wages in exchange.

This is not necessarily the right way to look at the subject, however. The former employees do not contend that the terms of the 1982-85 collective bargaining agreement survived its expiration. They simply want the terms honored during the years they were in force, when, they contend, they were third party beneficiaries. Once they left Jewel's employ, as they see things, the Union lost any control over their fate. Had the Union agreed in June 1985 that its existing members would receive no back pay, the plaintiffs believe that this would not have affected their claims, which "vested" (the plaintiffs say) hour-by-hour as they worked between February 1984 and their last day at Jewel. This could create a bargaining nightmare, because no one could represent all of the former employees, and Jewel could not settle their claims even if it treated them exactly as it treated those who continued to work. It is not, however, such a fanciful position that we can reject it out of hand. Because the district court proceeded on the assumption that Jewel could not change the terms unilaterally once the 1982-85 agreement expired, and the parties have not briefed this question,[3] we resolve the case on the terms on which it was presented.

The district court asked the question: Is the Union the representative of the ex-employees, capable of compromising (here, extinguishing) their contractual rights? It answered "no" for two reasons: the former employees are

[3] Except for an allusion in note 1 of Jewel's reply brief, which is too little, too late.

not "employees" under §2(3) of the National Labor Relations Act, 29 U.S.C. §152(3), so that the Union is not their statutory representative; and in any case the Union faced such a conflict of interest that it could not fulfill its implied duty of "fair representation", see *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967), and again is forbidden to compromise their claims. We start with the second point.

Conflicts among members of a union are inevitable and do not prevent a union from representing all employees in the bargaining unit. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). See also *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964). Older employees may want the union to obtain seniority systems and hefty pension plans, while younger employees may prefer wage scales linked to productivity and may want cash now rather than pensions later. As *Pittsburgh Plate Glass* demonstrates, unions face a conflict between benefits for active workers and benefits for the retired. Members will disagree about how to meld seniority lists in the event of a merger; some will prefer endtailing, some dovetailing. See *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976). Current members may like their high pay, while employers may want to reduce the average wage; union and employer therefore may agree that employees hired in the future (who by definition are not yet members of the bargaining unit) will receive lower pay. A two-tier wage structure poses many of the same problems as the two-tier settlement in this case. The list of potential conflicts can be extended indefinitely. Unions resolve these in bargaining, and they are not disqualified from representing members of the bargaining unit just because some members will benefit at the expense of others. There may be no satisfactory way to resolve the conflicts even in principle. See Mayer G.

Freed, Daniel D. Polsby & Matthew L. Spitzer, *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. Cal. L. Rev. 461 (1983). Congress has required unions to deal with conflicts by *considering* the interests of each group (the duty of fair representation) and by conducting internal operations in a democratic fashion. These statutory guarantees, coupled with the pressure the incumbent union faces from others seeking to organize the employees (or from the threat of decertification and non-union operation), induce unions to make reasoned choices. They will not be perfect, but they are apt to be good. See Comment, *The Union Judgment Rule*, 45 U. Chi. L. Rev. 980 (1987) (discussing the different sources of marketplace pressure leading unions to represent their many constituencies fairly well).

Sometimes the success of these devices—whether internal union politics or the threat of replacement by a new and better union—will be apparent. Suppose the Union, desirous of preserving a reputation for effective representation (in order to attract new members), had insisted that Jewel treat equally all who worked between February 1984 and June 1985, whether or not they were still on Jewel's payroll. Equal treatment would suggest that the Union had represented past employees fairly in relation to its current members.[4] So it is not impossible to imagine the Union adequately representing former employees, any more than it is impossible to imagine a union representing retirees vigorously. Every union knows that its members eventually become ex-employees as they retire or change jobs. Some will remain in the industry (and stay as members); the Union wants to keep them happy; many of the 2,000 former employees of Jewel must still work in supermarkets. Even those who plan to leave both in-

[4] "Suggest" rather than "prove", because the Union might accept a low settlement (say, 10¢ on the dollar for all) in order to get higher wages and benefits in the next contract; these future wages would accrue entirely to the existing work force, just as the payment of back wages under the actual agreement did.

dustry and union (by retirement or a change in line of work) want the union to look after their interests when they go, and they treat ex-employees well today so that they may be treated well tomorrow. The employer, too, has an interest in just treatment of former employees, for it wants to attract new labor and has a reputation to protect. It will look after former employees' interests, to an extent, in bargaining. Cf. Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. Chi. L. Rev. 1061 (1984). The potential for conflict among groups of employees therefore does not mean that a union is forbidden to attempt to broker the interests of the different groups. If it did, the idea of "exclusive representation", a bedrock principle of the NLRA, would quickly be lost. *Steele*, the first of the "fair representation" cases, concluded that only "hostile discrimination" (323 U.S. at 202-03) among members in negotiating a collective bargaining agreement violated the duty. See also *Flight Officers v. United Air Lines*, 756 F.2d 1274, 1281 (7th Cir. 1985). Certainly many a conflict arises, and is resolved, without such discrimination. Cf. James D. Holzhauer, *The Contractual Duty of Competent Representation*, 63 Chi.-Kent L. Rev. 255 (1987).

Our case involves more than the run-of-mine conflict among workers, however. It involves a conflict between current and former workers. Under §2(3) of the NLRA, 29 U.S.C. §152(3),

> The term "employee" shall include any employee . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any . . . individual employed as a supervisor . . . .

Although the statute does not in terms exclude workers who have retired, quit, or been fired, the parties have followed the implication of *Pittsburgh Plate Glass* in treat-

ing §2(3) as if it did. Jewel's former employees therefore lost their status as NLRA "employees" when they left work for reasons other than a labor dispute or unfair labor practice. Although failure to implement the terms of a collective bargaining agreement may be an unfair labor practice if it is an end run around the bargaining process, *Westinghouse Electric Corp. v. NLRB*, 809 F.2d 419 (7th Cir. 1987); *Fall River Savings Bank*, 260 N.L.R.B. 911 (1982), so that those who quit in protest (like those fired in violation of the agreement) remain "employees", neither Jewel nor the Union has contended that any substantial portion of the 2,000 quit for this reason. Unions represent ex-employees all the time when trying to obtain their reinstatement under an agreement, or when pressing other claims connected with their departures. The Union did not treat these 2,000 former workers as "employees" for the purpose of voting on the new pact in June 1985, however, and Jewel did not treat them as employees for any purpose. Again we follow the parties' lead in assuming that the 2,000 former workers are not statutory "employees"—without deciding whether this question would have had a different answer had the parties chosen a different litigating strategy.

A union need not represent non-employees. *Pittsburgh Plate Glass* establishes this.[5] Representation is not forbidden, however; §2(3) excludes supervisors from the status of "employee", but unions may represent supervisors with their, and the employer's, acquiescence. 29 U.S.C. §164(a); *Florida Power & Light Co. v. Electrical*

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[5] The union may not, however, deliberately injure (on forbidden grounds) even those whom it does not represent in bargaining. *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952). The extent to which such wrongful conduct may support a finding of unfair labor practices is canvassed in Bernard D. Meltzer & Stanley D. Henderson, Labor Law 1133-45 (3d ed. 1985). The Board has held lawful under the NLRA a settlement that favored existing employees over departed ones, *Steelworkers Local No. 2869*, 239 N.L.R.B. 982 (1978), but this does not resolve the question before us.

Workers, 417 U.S. 790, 812-13 (1974). Cf. *NLRB v. Electrical Workers*, 107 S. Ct. 2002 (1987); *NLRB v. Hendricks County Rural Electrical Membership Corp.*, 454 U.S. 170 (1981). So too unions may bargain on behalf of retirees if the employer is willing, although the retirees need not accept the offer of representation. *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20; *United Automobile Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1484 (6th Cir. 1983). Former employees might choose the union as their agent for purposes of implementing or compromising claims arising under a collective bargaining agreement. It is even possible that employees may assent through the agreement itself to make the union their agent to resolve all disputes arising out of the implementation of that agreement—disputes that by definition arise during the employment relation—even if they leave work before its end. Such a consent would enable the union and the employer to administer the agreement without the complications caused by a proliferation of parties as employees quit or leave. Perhaps consent of this sort should be implied from the presence of an arbitration clause, which appears to put the Union in charge of handling claims of current and former employees. Persons represented by a union and covered by a collective bargaining agreement—even those no longer working—must exhaust union remedies before filing suit under §301, see *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), which may imply that the union always administers the collective bargaining agreement even for those no longer classified as statutory "employees". Cf. David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663, 774, 792, 811 (1973) (contending that collective bargaining agreements necessarily exclude the possibility of individual enforcement rights). Again, however, the parties have not discussed whether the former employees assented to representation by the Union—in the collective bargaining agreement itself or by acquiescing in the Union's pursuit of their rights through arbitration—or have exhausted their internal remedies. We do not speculate on the implications of such an approach for future litigation.

Having excluded other ways of looking at things, we are left with the district court's: that because the 2,000 former workers are not statutory "employees", the Union does not represent them. The Union owes no duty to those it does not represent. If it does not have a duty to represent them at all, it does not have a duty to represent them "fairly". The Supreme Court implied that duty from the statutory rule of exclusive representation. See *Steele* and *Vaca*. If the ex-workers are free to cut their own deals with Jewel, but let the Union bargain for them instead, then the Union's duty is fixed by the terms of any agreement creating these bargaining rights. The ex-employees' ability to shop for agents, to pit the union against members of the bar for the right to represent them on the claims, removes the foundation for implication of a "duty of fair representation". It leaves the plaintiffs in control of their own fate. And they have not compromised with Jewel their claims arising out of the 1982-85 agreement.

This is an unsettling conclusion, because it frustrates the ability of union and employer to resolve existing disputes. See *Republic Steel Corp.*, 379 U.S. at 653. Holdouts among the former employees may leave the dispute as a festering sore, undermining labor peace. Inability to reach a global settlement does not necessarily favor either employer or (ex-) employee; a settlement under a union's auspices presumably would reflect the chances of prevailing before an arbitrator or in court under a §301 suit, and former employees representing themselves may either settle on similar terms or press on to litigation, where they will win or lose but on average expect to get the same sort of deal that was reached in bargaining. The proliferation of persons with authority to bargain on their own will raise the cost of bringing the dispute to a conclusion, however, and the prospect of some ex-employees' suing and winning may make a union leery of compromising the claims of the current employees. The compromise will look bad in retrospect if ex-employees get 100¢ on the dollar. The net effect may be to delay settlement of

disputes and increase the risk borne by workers and employers alike.

Nonetheless, the parties' failure to make arguments that might have avoided this consequence leaves us with little choice. If the Union did not represent the plaintiffs *at all* in June 1985, then it is hard to see how it could have surrendered their claims. One of the Union's officers testified in a deposition that he perceived a conflict between current and former members of the bargaining unit and "absolutely" favored the active members. The plaintiffs were not part of the bargaining unit and were not notified of the settlement or offered an opportunity to vote on it.[6] The former employees did not receive any form of vicarious representation—that is, they did not get the same terms as those still employed on June 21, 1985. On the assumption, shared by all in the district court, that the "duty of fair representation" and the power to compromise the ex-employees' claims are necessarily linked, we hold that the Union did not have (and if it had did not fulfill) such a duty toward the plaintiffs in June 1985. The district court now must decide whether Jewel's unilateral reduction of wages and benefits in February 1984 violated the collective bargaining agreement.

AFFIRMED

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[6] Jewel observes that the package deal settling the old dispute and adopting a new collective bargaining agreement passed by such a large margin that it would have been adopted had all 2,000 former employees appeared and voted "no". That may well be, but the former employees were excluded from the deliberations as well as from the voting, and we do not lightly assume that arguments made at union meetings are irrelevant to the members' decisions.

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APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 90-2184

KELLY MERK, JOSEPH STASZEWSKI, and VICKIE MENAGH et al., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

JEWEL FOOD STORES DIVISION OF JEWEL COMPANIES, INCORPORATED, AMERICAN STORES COMPANY, INCORPORATED, and UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL No. 881, chartered by United Food and Commercial Workers International Union, AFL-CIO and CLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 7876—**Richard A. Posner**, *Judge.*

ARGUED DECEMBER 13, 1990—DECIDED SEPTEMBER 27, 1991

Before CUDAHY, EASTERBROOK and RIPPLE, *Circuit Judges.*

CUDAHY, *Circuit Judge.* This case involves application of the parol evidence rule to the unique context of collective bargaining agreements. Specifically, we must determine the legal significance of secret oral negotiations between

union officials and company management that modify central terms of a collective bargaining agreement which was submitted to the union membership for ratification without any notice that it would be conditioned by additional terms.

I.

The relevant facts are as follows. Jewel Food Stores (Jewel) operates approximately 180 supermarkets in and around Chicago, employing over 15,000 workers who are represented by Local 881 of the United Food and Commercial Workers Union (the Union). In September 1982, Jewel and the Union began negotiating a new collective bargaining agreement (the CBA) to run from September 15, 1982 to June 15, 1985. Negotiations culminated in a contract which was reduced to writing and ratified by the Union membership on January 27, 1983. The CBA established wage rates, vacation leave and other terms of employment for the duration of the contract. Section 4.1 of the CBA, in particular, specified that "During the term of this Agreement, the Employer agrees to pay not less than the minimum wage rates set out in Appendix A."

Had the CBA embodied the entire agreement between the parties, this case would have been easily resolved. But the outcome of negotiations was not so straightforward. Anxious about the potential entry into the Chicago market of warehouse competitors such as Cub Foods, Jewel insisted that the CBA contain a "most favored nations" clause, a provision that would allow it to match the wages of unionized competitors opening in the Chicago market after the start of the contract term. The Union refused this demand throughout the negotiations, and the final compact did not include a most favored nations clause. Just before the CBA was approved, however, Union president Fred Burki and two Jewel representatives—Neil Petronella, chief negotiator, and Marsh Collins, corporate vice president—forged a secret deal at an informal hallway meeting late in the evening of January 23, 1983. The precise terms of that deal are in dispute: Union officials claim

that all they promised was to "sit and discuss" Jewel's competitive position once Cub Foods entered the Chicago market whereas Jewel executives contend that they agreed to "an economic reopener with full reservation of rights." An economic reopener provision permits the company to reopen all economic terms of the CBA upon occurrence of the condition precedent. Negotiations may then proceed as if the parties were bargaining over a totally new contract, and both sides retain their respective economic weapons, including the Union's right to strike and the company's right to lock out or unilaterally implement a final offer after bargaining to impasse. Whatever the terms of the secret oral agreement between Union officials and Jewel management, both sides affirm that it was never disclosed to or ratified by the Union rank and file even though ratification is required under the Union constitution and bylaws.

Cub Foods' entry into the Chicago market in 1983 precipitated this dispute. Shortly thereafter, Jewel announced the reopening of contract negotiations. On February 26, 1984, when negotiations reached impasse, Jewel unilaterally implemented its final offer, cutting the wages of its employees below levels mandated by the CBA. Jewel slashed wages by as much as $1.25 an hour and reduced vacation and personal day benefits as well. The Union immediately filed an unfair labor practice complaint and sued to compel arbitration. The district court ordered Jewel to arbitrate. After an arduous course of negotiations, the Union and Jewel finally resolved their longstanding dispute on the eve of expiration of the CBA: Jewel agreed to award backpay to its current employees while the Union pledged to relinquish its unfair labor practice complaint and the district court suit. At Jewel's insistence, however, the settlement abandoned the plaintiffs in this case—a class comprising approximately 2,000 Jewel employees who retired, quit or were fired during the protracted 15-month battle.

Claiming the back wages to which they believed they were rightfully entitled under the CBA, plaintiffs filed suit

against the Union for breach of its duty of fair representation and against Jewel for breach of contract. The district court granted summary judgment for the Union, ruling that the Union owed no duty of fair representation to former employees. 641 F. Supp. 1024 (N.D. Ill. 1986). In an interlocutory appeal, this Circuit upheld the district court's ruling, 848 F.2d 761 (7th Cir. 1988), and the Supreme Court denied certiorari, 109 S. Ct. 393 (1988).

Plaintiffs' breach of contract action against Jewel, however, proceeded to a one-week jury trial. After the jury returned a verdict in favor of Jewel, plaintiffs moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. The district court denied both motions, examining and rejecting each of plaintiffs' arguments in turn. Invoking the parol evidence rule, plaintiffs first contested the district court's admission of extrinsic evidence regarding the oral reopener to modify the provisions of the written CBA. But the district court submitted the parol evidence issue to the jury because it was not clear from the face of the CBA whether it was intended to embody the parties' entire agreement. The jury determined that the CBA was not integrated and the district court apparently agreed with this conclusion, upholding the jury's verdict as supported by the evidence. The district court also dismissed plaintiff's second argument, ruling that oral modifications to a written CBA do not violate national labor policy. Finally, it held that lack of ratification did not render the oral reopener agreement invalid. The jury found waiver of the ratification requirement based upon evidence of a past practice of adherence to unratified side agreements. The district court agreed with the jury's conclusion but broadly declared that, in any event, Jewel had a right to rely on the unratified oral reopener absent clear notice that the Union was acting in bad faith against the interests of its members.

On appeal, plaintiffs challenge the verdict against them on the following grounds. First, they claim that the district court improperly admitted evidence of the oral reopener agreement in violation of the parol evidence rule.

Second, they argue that the oral reopener agreement should not have been enforced because it violated the Union's constitutional requirement that significant terms of the labor contract be ratified by union members. Third, they contend that section 8(d) of the Labor Management Relations Act (LMRA) and national labor policy militate against enforcement of a clandestine oral reopener agreement that contradicts the terms of the written and ratified CBA. Fourth, they maintain that the district court committed numerous evidentiary errors, entitling them to a new trial. Finally, they contest the district court's dismissal of their claim for punitive damages.

II.

We review the district court's denial of judgment notwithstanding the verdict *de novo*, applying federal common law (rather than the law of any state) to this suit for breach of a collective bargaining agreement. *See Mohr v. Metro East Mfg. Co.*, 711 F.2d 69 (7th Cir. 1983). For Congress has accorded labor contracts a special status, authorizing the courts to fashion a body of federal common law governing their enforcement. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957) ("[T]he substantive law to apply in [breach of contract] suits under § 301(a) is federal law, which the Courts must fashion from the policy of our national labor laws."). This special solicitude reflects the fact that the collective bargaining agreement is more than a mere contract—it is "the charter instrument of a system of industrial self-government." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring). Ordinary common law contract principles, therefore, cannot simply be imported whole into the labor context and mechanistically applied to collective bargaining agreements. To foster industrial peace and stability, we must instead read collective bargaining agreements with sensitivity to considerations of national labor policy.

A. The Parol Evidence Rule

We must first determine whether the parol evidence rule bars the admission of testimony regarding the secret oral agreement. The parol evidence rule provides that evidence of prior or contemporaneous agreements or negotiations may not be introduced to contradict the terms of a partially or completely integrated writing. *See* Restatement (Second) of Contracts § 215. A writing is deemed fully integrated if the parties intend it to be the expression of their entire agreement. If they intend the writing to be the final expression of the terms it contains but not a complete expression of all the terms agreed upon—some terms remaining unwritten—the agreement is termed partially integrated. *See* E. Farnsworth, Contracts 452 (1982). If a writing is only partially integrated, evidence of prior or contemporaneous agreements is admissible to supplement its terms though not to contradict it. If an agreement is completely integrated, however, not even evidence of a "consistent additional term" may be introduced to elucidate the writing. *See id.*; Restatement (Second) of Contracts § 215.

Whether a writing is fully integrated is generally a question of law to be resolved by a court. *See Calder v. Camp Grove State Bank*, 892 F.2d 629, 631-32 (7th Cir. 1990); E. Farnsworth, Contracts 460. A judge and not a jury should ordinarily answer this threshold question because it often requires going beyond the four corners of the written document and scrutinizing the very extrinsic evidence whose admissibility is at issue. *See* E. Farnsworth, Contracts 456 n.25 ("[I]f there seems to be some circularity in examining the very evidence whose admissibility is at stake in order to determine its admissibility, it may help to keep in mind that this examination is made as a matter of law in order to determine whether the evidence shall go to the trier of fact."). But the district court entrusted the issue of integration to the jury because the CBA did not on its face clearly indicate whether it was intended to incorporate all the terms of the contract. The

jury accordingly heard testimony regarding the oral agreement and concluded that the CBA was not intended to be a complete integration of all the parties' understandings. Because the district court concurred in the jury's verdict that the CBA was not integrated, the parol evidence rule did not apply. Hence the secret side agreement could be introduced to vary or contradict the terms of the written CBA.

We agree that the parties did not intend the written terms of the CBA to embody their entire agreement, for neither the Union nor Jewel denies the existence of an additional oral term to the contract—they only dispute its content. Union officials claim that all they promised was to "sit and discuss" Jewel's competitive position once Cub Foods entered the Chicago market. Jewel executives maintain, on the other hand, that they agreed to "an economic reopener with full reservation of rights conditioned on the entry of Cub Foods into the Chicago market." Because both sides concede that there was an additional oral term to their contract, it necessarily follows that the written terms of the CBA did not represent a full integration. And once the CBA was found not integrated as a matter of law, it was proper for the jury to resolve the additional factual question of the precise terms of the oral promise. The jury ultimately believed Jewel's version of the story, concluding that the parties had orally agreed to reopen the economic terms of the contract in the event Cub Foods penetrated the Chicago market. The oral reopener, therefore, became an enforceable part of the CBA.[1]

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[1] The jury could in theory have reached another conclusion: it could have determined that the CBA represented a *partial* integration, at least as to basic economic terms such as wage rates and the duration of the contract. The jury could have found that the written CBA embodied the entire agreement of the parties as to these fundamental terms. Had the jury so concluded, parol testimony could not have been admitted to contradict the CBA although it might still have been introduced to supplement the CBA with respect to collateral matters.

Mechanical application of the parol evidence rule would thus permit Jewel to introduce testimony regarding the oral side agreement. Yet our analysis of the parol evidence issue cannot proceed in a vacuum, abstracted from the particular setting in which it arose. Because this secret oral reopener undercuts obligations specified in a collective bargaining agreement, it inevitably implicates national labor policy. The critical question before us, then, is whether national labor policy allows enforcement of a clandestine oral side agreement that alters fundamental terms of the written and ratified collective bargaining agreement.

As the Supreme Court has recognized, a collective bargaining agreement is more than just a contract—it erects a system of industrial self-government. *See United Steelworkers*, 363 U.S. at 570. Indeed, certain terms of the collective bargaining agreement are deemed so important that their negotiation is mandated by law. *See Ford Motor Co. v. National Labor Relations Bd.*, 441 U.S. 488 (1979). Yet the laws regulating labor relations would have little substance if the central provisions of the collective compact could be nullified by means of secret side agreements. Union officials and management would then be free quietly to barter away basic guarantees contained in the collective bargaining agreement and relied upon by all union members. In a slightly different context, Judge Easterbrook forcefully emphasized the hazards of oral side agreements that alter the terms of a written contract: "[D]efenses based on . . . oral side agreements . . . are as a class the defenses most likely to breed litigation even when asserted in good faith, and they create manifold oportunities for manipulation by crafty operators." *Central States Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148, 1154 (7th Cir. 1989) (en banc). To avert industrial strife, collective bargaining agreements must be more secure than garden variety contracts. Accordingly, we hold that national labor policy forbids introduction of prior or contemporaneous secret agreements to contradict fundamental terms of a

ratified collective bargaining contract. This secret oral reopener is, therefore, inadmissible and unenforceable as a matter of federal law.

A number of courts have similarly refused on grounds of national labor policy to enforce covert oral side agreements that undermine the written collective bargaining agreement. The seminal case of this genre is *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945), where the court adapted the parol evidence rule to the labor context to exclude evidence of an oral agreement that contradicted the terms of the written collective bargaining agreement. In that case, an oral side agreement between Gatliff Coal and union officials allowed the company to pay lower wages than those specified in the collective bargaining agreement. Upon suit by employees compensated under the orally agreed-upon rates, rather than those mandated by the written compact, the court held that the National Labor Relations Act clearly precluded the company's reliance upon a prior or contemporaneous oral agreement to modify the terms of the written collective bargaining agreement. *See id.* at 56 n.1.[2]

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[2] Elaborating at length upon the problem of secret side agreements, the *Gatliff Coal* court declared:

> In utilizing collective bargaining agreements to implement a National Labor policy designed to remove certain recognized sources of industrial strife by encouraging friendly adjustment of industrial disputes as to wages, hours of work and other conditions of employment, upon a plane of equality of bargaining power between employers and employees, the National Labor Relations Act, in the public interest, has given such collective bargaining agreements a more secure and stable position in our National economy than that of ordinary common law contracts which may be altered at pleasure by rendering ineffectual and unavailable any collateral agreements between individual members of the collective bargaining group designed to obtain a diminution of the obligations of a particular employer or abridgment of the benefits accruing to particular employees under the collective agreement . . . . To hold otherwise "would reduce the National Labor Relations Act to a mere

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Gatliff Coal was followed in *Local 509, Missouri-Kansas-Nebraska-Oklahoma District Council, Int'l Ladies Garment Workers Union v. Annshire Garment Co.*, 65 L.R.R.M. 2769 (D. Kan. 1967), which prophesied that serious evils would ensue from recognition of a secret side agreement negating the terms of the written collective bargaining contract. Invoking national labor policy, the *Annshire* court declared: "To suppress industrial strife based on this type of controversy, national labor policy requires that the clear and unambiguous requirements of the written collective bargaining agreement be immune from attack founded on a covert side agreement." *Id.* at 2772; *see also N.D.K Corp. and Food and Commercial Workers, Local 1550 AFL-CIO*, 278 N.L.R.B. 151, 122 L.L.R.M. 1253 (1986) ("National labor policy requires that evidence of oral agreements be unavailing to vary the provisions of a written collective-bargaining agreement valid on its face."); *Restaurant Employees, Bartenders and Hotel Service Employees Welfare Fund v. Rhodes*, 90 Wash. 2d 162, 580 P.2d 611, 99 L.L.R.M. 2868 (Wash. 1990) (federal labor law forbids parol testimony to vary the terms of a written collective bargaining agreement).

Ignoring this long line of precedent, however, the district court allowed introduction of the oral reopener to vary the terms of the written CBA. The district court relied upon *Mohr v. Metro East Mfg. Co.*, 711 F.2d 69, to buttress its holding. But our decision is not inconsistent with *Mohr*, which held only that the parol evidence rule does not prevent an individual employer from modifying an industry-wide collective bargaining agreement reached between an employers association and an international union by means of oral agreements with the union local. As the *Mohr* court observed:

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futility and leave collective agreements no stronger than the weakest members of the union." Statutes requiring collective bargaining would have little substance if what was made collectively could promptly be unmade individually.

152 F.2d at 56 n.1 (citations omitted).

> The agreement between the association and the international union was deliberately left incomplete in recognition of the diversity of circumstances to which it had to apply, thus allowing individual employers and their local unions to add to the provisions, whether by supplemental written agreements, or oral agreements, or as in this case by both sorts.

Id. at 72-73. Unlike the case at bar, the oral agreement in *Mohr* was not kept hidden from the Union membership. It dealt, moreover, with a purely peripheral matter regarding the terms of employment for schoolboys. Therefore, parol evidence was admissible in *Mohr* to supplement the general terms of the industry-wide collective bargaining agreement and to adapt them to local conditions.

We do not hold that a collective bargaining agreement must be in writing to be enforced. On the contrary, section 8(d) of the National Labor Relations Act does not require collective bargaining agreements to be in writing unless one of the parties requests that they be. *Central States, Southeast and Southwest Areas Pension Fund v. Behnke*, 883 F.2d 454, 459 (6th Cir. 1989); *Gariup v. Brichler Ceiling and Interior Co.*, 77 F.2d 370, 373-74 (7th Cir. 1985); *Eastern Washington Distributing Co.*, 216 N.L.R.B. 1149, 1151 (1975). Section 8(d) thus embodies a considered decision to allow oral collective bargaining agreements when both parties prefer them. *Hamilton Foundry & Machine Co. v. International Molders and Foundry Workers Union*, 193 F.2d 209, 214 (6th Cir. 1952). Therefore, a collective bargaining agreement may be partly or wholly oral as well as partly or wholly in writing, and a written collective bargaining agreement may be orally modified. *Certified Corp. v. Hawaii Teamsters and Allied Workers*, 597 F.2d 1269, 1271-72 (9th Cir. 1979).

The real danger posed by this reopener agreement stems from its secrecy and not simply from its oral character. No one disputes that the oral reopener was, at the behest of Union officials, deliberately concealed from the union

membership. In a precursor to the present litigation, Jewel filed a counterclaim alleging that the Union had breached the oral reopener agreement in violation of section 301. In denying Jewel's counterclaim, Judge Getzendanner perceptively singled out the vice of this secret side agreement:

> [The] oral agreement is inadmissible and unenforceable under the parol evidence rule as a matter of federal law. . . . Jewel's argument that the written contract is not a complete integration is insufficient to avoid application of the parol evidence rule since even a partially integrated written agreement cannot be contradicted by evidence of a prior oral understanding. This rule is particularly important in the context of labor relations, lest union leaders engage in side agreements unknown to the rank and file membership.

United Food & Commercial Workers Union v. Jewel Food Stores, No. 84 C 1648 (N.D. Ill. April 8, 1985) (Getzendanner, J.). The economic reopener strikes at the heart of the CBA: it throws open the most central provisions governing wages and benefits upon the entry of Cub Foods into the Chicago market. Yet Jewel and the Union explicitly collaborated to keep the oral reopener hidden from the rank and file membership despite its paramount significance. Thus Union members who reasonably believed that they were guaranteed a fixed rate of pay for the duration of the CBA unexpectedly found their wages slashed at mid-term. Under these circumstances, enforcement of an oral reopener that was concealed and withheld from ratification by the membership is certainly in derogation of national labor policy.

B. The Ratification Requirement

Our holding does not rest solely upon *Gatliff Coal*, which completely eschewed all evidence of prior or contemporaneous agreements modifying the provisions of a collective bargaining agreement. For the facts of this case acquire their significance from the use of secrecy and the failure

to seek ratification from the Union membership. We emphasize that non-ratification was coupled here with a deliberate policy of secrecy—a factor which is crucial to our analysis. Federal law does not itself require ratification of a collective bargaining agreement. In this case, however, the Union's own constitution and bylaws mandate that collective bargaining agreements be ratified. Jewel understood, moreover, that the oral reopener had not been ratified by the Union membership in violation of the Union constitution. Failure to ratify under circumstances where an employer is aware both of the ratification requirement and of the failure to comply with it may invalidate an employer's claims under the unratified agreement. *See Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747, 756-58 (3d Cir. 1977); *Meyerson v. Contracting Plumbers Ass'n*, 606 F. Supp. 282 (S.D.N.Y. 1985).

Jewel argues, however, that a past practice of non-ratification of contract terms could establish waiver of the ratification requirement. *See Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1113-14 (6th Cir. 1986). In *Kraftco*, the Sixth Circuit suggested in dicta that waiver of the ratification requirement could be imputed from well-entrenched practices and customs amounting to an established history of non-ratification. Yet Jewel has failed to demonstrate any established history of non-ratification of *substantial* terms of the labor contract. It is true that peripheral terms of the contract involving personal days, fatigue mats and the cluster group seniority system were generally viewed as binding even though unratified. But these provisions do not rise to the level of significance of a reopener that abrogates basic wage provisions upon the occurrence of a specified condition. The reopener involved a matter of fundamental importance—it dealt with the central question whether any of the employees in the bargaining unit could rely upon the level of wages ostensibly guaranteed by the CBA for its duration. It is disingenuous to equate such a provision with the terms regarding fatigue mats or the rollback of paid personal days. In fact, the reopen-

ing of labor contracts during their term is deemed so significant that it is expressly forbidden by Section 8(d) of the National Labor Relations Act except when provided by contract. This provision argues strongly against unratified reopeners. *See generally Texaco v. National Labor Relations Bd.*, 722 F.2d 1226 (5th Cir. 1984); *Meyerson*, 606 F. Supp. 282.

We decline Jewel's invitation to infer waiver of the ratification requirement from past instances of non-ratification involving contract terms of such trifling magnitude. To do so would be counter to national labor policy. It would encourage unions to submit every issue—no matter how trivial—to the membership for ratification out of fear of waiver. Failure to ratify routine matters, therefore, should not be deemed a blanket waiver of the ratification requirement as to the essence of a collective bargaining agreement.

In its strenuous efforts to establish a past practice of waiver, Jewel can point to only one meaningful instance of non-ratification. An unratified provision of the 1969 collective bargaining agreement between Jewel and the Union allegedly allowed wages to be reopened and renegotiated upwards in the event that the Teamsters Union attempted to organize the workers. But any resemblance between the 1969 reopener and the 1983 reopener stops short at the surface, for the 1969 provision furthered the interests of *all* parties: Jewel benefited by keeping the Teamsters out of its stores, the Union benefited by retaining its membership and the members benefited by gaining a possible raise in salary. Such a provision, therefore, is hardly analogous to a controversial wage reopener allowing Jewel to cut wages unilaterally in the event that another employer paying lower wages entered the market.

The district court found failure to ratify the reopener immaterial even in the absence of any past practice of non-ratification. Citing *Chrysler Workers Ass'n v. Chrysler Corp.*, 834 F.2d 573, 582 (6th Cir. 1987), the court broadly pronounced that Jewel had a right to rely upon its agreement with the Union whether or not it was ratified

absent clear notice that the Union was acting in bad faith against the interests of its members. *See Merk v. Jewel Food Stores*, No. 85 C 7876, slip op. at 9 (N.D. Ill. April 9, 1990). The district court's interpretation of *Chrysler Workers*, however, is inapposite. For *Chrysler Workers* involved a side letter agreement between a union and a former employer which dealt only with certain workers' transfer rights. Such an agreement is hardly comparable to a provision which could potentially result in the lowering of the wage level of workers in the bargaining unit across the board. Of even greater importance, moreover, is the fact that the side agreement involved in the *Chrysler Workers* case was not kept hidden from the union membership. Notice and an explanation of the side agreement were, on the contrary, readily available to all union members:

> Shortly after the letter agreement the Union put plaintiffs and other "work opportunity employees" who had transferred to the Lima plant on notice of a meeting to be attended by international union representatives in July of 1982 to "explain the agreement and to answer questions." There was no affirmative act of concealment.

834 F.2d at 582. By contrast, in the present case the economic reopener was deliberately concealed from the membership and Jewel participated at least passively in this concealment.

Union officials explicitly enjoined Jewel management to keep the reopener secret. Jewel is hardly an unsophisticated employer. Aware of the secrecy surrounding the oral reopener, it must have drawn the obvious conclusion that the terms of the side agreement would not be submitted for ratification or even disclosed to the Union membership. Jewel now argues that it believed the secrecy was intended solely to keep the reopener hidden from the International Union. But whether concealment was motivated by a desire to keep the side agreement from the membership or from the International is irrelevant: the reopener was in fact kept from the membership

and Jewel was on notice of this fact. Subsequently, when it was submitted to the membership in connection with the present plaintiffs' suit against the Union, this same reopener was overwhelmingly voted down. It would not have been difficult for Jewel to predict that such a provision would have been at least highly controversial and might well have been overwhelmingly defeated by vote of the membership. We need not close our eyes to industrial realities.

Jewel now argues, however, that the reopener may not have been ultimately to the detriment of the membership. Perhaps the oral reopener stood in place of the most favored nations clause initially sought by Jewel, a provision which might have been even more onerous to the membership. Or perhaps Jewel would not have agreed to as high a wage level as it did had it not been able to obtain the oral reopener. But it is not for us to decide whether the reopener would have ultimately benefited or harmed the Union membership. All that is clear is that the reopener was a matter of critical concern that should have been disclosed to the membership and submitted for ratification. Union leaders may actually comprehend the needs of their members better than the members do themselves. This type of paternalism, however, is hardly consonant with the accepted principles of union democracy enshrined in the federal labor laws. Accordingly, we hold as a matter of federal law that Jewel was not entitled to rely upon a reopener that it knew was not ratified, or even disclosed to the union membership, in violation of the Union constitution.[3]

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[3] *McLaughlin & Moran, Inc.*, 299 N.L.R.B. No. 7 (1990), does not hold otherwise. In *McLaughlin*, the union sought to escape a collective bargaining agreement on the grounds that it had failed to follow its own procedures for ratification by allowing casual employees to vote. The National Labor Relations Board concluded, however, that the collective bargaining agreement was binding only because the company had no reason to know or suspect that any mistake had been in the ratification process. "That the [union]

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The dissent concedes that an agreement by an agent without actual or apparent authority is empty under the law. As the dissent points out, union officials lacked actual authority to agree to an unratified reopener and they lacked apparent authority because Jewel knew of the ratification requirement but acquiesced in a deliberate policy of secrecy. The dissent attempts to avoid the logical consequences of its concessions, however, by reiterating Jewel's argument that a past practice of non-ratification of contract terms demonstrated waiver of the ratification requirement. In particular, the dissent focuses upon the unratified 1969 reopener. According to the dissent, the nub of our argument is that "[r]eopeners are OK when they help the employees . . . but not when they help the employer." *Infra* at 34. But the dissent obviously mischaracterizes our holding. Non-ratification of the 1969 reopener is unproblematic not because it might have benefited the membership but rather because it would clearly have been ratified. The 1969 reopener was not a burden but a benefit whose ratification would have gone unquestioned. For surely no one would or could complain of concealment of a benefit. This is tantamount to being pleasantly surprised by a gift.

The 1983 reopener, on the other hand, concealed a burden (a potential wage reduction) from the membership against whom it was later enforced. Purporting to even-handed treatment of both sides, the dissent maintains that

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may have mistakenly followed the wrong procedures," the Board wrote, "does not absolve it from being bound by the representations [the union negotiator] made to [the company], *when [the company] had no way of knowing or even suspecting that a mistake may have been made.*" Ignoring this careful language, the dissent maintains that an agreement approved by union officials is binding regardless whether or not it is ratified. But the dissent's reading of *McLaughlin* is far too broad: *McLaughlin* does *not* go so far as to allow a company to rely upon an agreement made in flagrant violation of a union ratification requirement even when the company is aware both of the requirement and that it has been flouted.

secret side agreements should be enforced equally whether they redound to the benefit of the employer or the employee. Despite its seductive symmetry, however, the dissent's argument is substantively flawed. For with respect to information, employers stand in a position radically different from employees. Employers are apprised of every facet of the collective bargaining agreement—oral or written, secret or publicized to all the world. Thus no aspect of the collective bargaining agreement—whether it is beneficial or detrimental—catches the employer by surprise.

The dissent insists for unexplained reasons upon the dubious proposition that labor is a commodity of the same order as coal, a view that is definitively refuted by the law: "The labor of a human being is not a commodity or article of commerce." Section 6 of the Clayton Act, 15 U.S.C. § 17; *see also Transportation-Communication Employees v. Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966) ("A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts."). The dissent also trumpets the need for flexibility in labor relations. Flexibility may be a virtue in collective bargaining agreements but it should hardly extend to surreptitious downward adjustments of basic wages. Such changes, if concealed, are highly destabilizing, producing strikes and lawsuits which the national labor policy does indeed eschew. The dissent protests overmuch about *Gatliff Coal*, which takes the common-sense position that paying wages based upon an oral side agreement (presumably undisclosed to the employees) in the face of a written contract for higher wages violates national labor policy because it obviously promotes industrial unrest and bitter controversy. Disparaging *Gatliff Coal* as old and outmoded, the dissent cites no more recent case on point.[4] The dissent is unable to find any

[4] The dissent cursorily refers to a string of cases which it claims run counter to *Gatliff Coal*. But, read closely, these cases hold

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case which holds *contra* to *Gatliff Coal*. That is probably because the principles of fairness underlying *Gatliff Coal* are still central to the labor law of the land.

C. Punitive Damages

Finally, plaintiffs' request for punitive damages must fail. The district court properly concluded that punitive damages should not be awarded in this suit for breach of a collective bargaining agreement. As the district court cogently reasoned, if punitive damages are not available for breach of the duty of fair representation, *see International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), then they are surely not available for a simple breach of contract. For astronomical damages might threaten the goal of harmonious resolution of labor disputes which is at the core of national labor policy. At the very least, we should not award punitive damages in this case because it involves at worst a simple breach of contract uncomplicated by evidence of fraud or other tortious misconduct. *See Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 750-51 (7th Cir. 1988).

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only that parol evidence may be considered to resolve ambiguities or fill in gaps in a written collective bargaining agreement. *E.g.*, *Matuszak v. Torrington Co.*, 927 F.2d 320 (7th Cir. 1991) (can look to course of dealing to determine whether laid-off employee may receive seniority for time of layoff); *Bokunewicz v. Purolator Prod., Inc.*, 907 F.2d 1396 (3rd Cir. 1990) (can look to parol evidence to determine when employees' benefits vested); *Manville Forest Prod., Inc. v. Paperworkers Union*, 831 F.2d 72 (5th Cir. 1987) (can look to past practices and negotiating history to determine whether company was obliged to fill "broke hustler" position if shut-down paper machine were reactivated); *Machinists v. Sargent Indus.*, 522 F.2d 280 (6th Cir. 1975) (can resort to parol evidence to elucidate meaning of term "sound actuarial basis" used in CBA). None of these cases dealt with the problem addressed in *Gatliff Coal* and presented here—whether to enforce a secret agreement that contradicts fundamental terms of a written CBA.

III.

The district court apparently examined each of plaintiffs' arguments in isolation, overlooking their combined significance. One by one, the court addressed the parol evidence rule, the Union's ratification requirement and national labor policy. Taken individually, as the district court did here, none of plaintiffs' arguments may be dispositive. Read together, however, they clearly illuminate the grave dangers posed by a backroom deal that is secretly negotiated between union officials and company management without the knowledge or consent of the union rank and file. The district court's decision is therefore REVERSED and REMANDED for further proceedings consistent with this opinion.

EASTERBROOK, *Circuit Judge*, dissenting. An employer, fearing a rival with a reputation for low wages (more to the point, low prices) demands a most-favored-nations clause, under which it would receive the benefit of any concessions the union makes to the rival. Unions prefer not to make such bargains. A strike looms: the employer will not sign a contract without a most-favored-nations clause, and the union will not sign a contract with one.

At the last minute they agree to replace the contested clause with a reopener. Although the contract is to run for three years, if the dreaded competitor enters the market sooner either side may renew negotiations with the usual privileges: after good faith bargaining to impasse, the employer may implement its final offer, the union may strike, or both. *Electrical Workers Local 47 v. NLRB*, 927 F.2d 635 (D.C. Cir. 1991). A reopener can work in either side's favor depending on economic conditions. It does not modify or contradict any other term of the contract; it is part of the terms, giving each side an option.

The rival entered; the employer exercised the right to reopen; union and employer bargained to impasse, and the employer implemented its final offer. When the dust settled the union retained the fundamental terms of the contract (including wages) and won back pay for its members. But it did not seek back pay for employees who left the firm before that settlement. These employees tried to tax the union with breach of its duty of fair representation but lost. *Merk v. Jewel Companies, Inc.*, 848 F.2d 761 (7th Cir. 1988). So also the ex-employees lost their contract suit against the employer. A jury determined that the deal was as I have described it, that the plaintiffs received their contractual due.

The reason this case went to a jury at all is that the reopener was oral, while the bulk of the pact was written. But as the union conceded that there had been an oral side agreement, disputing only the employer's description of its content, the parol evidence rule did not prevent the jury from determining whose version is cor-

rect. My colleagues agree with the trial judge, 734 F. Supp. 330 (N.D. Ill. 1990), and 1990 U.S. Dist. LEXIS 5486, that the doctrines applied to commercial cases enforce that oral agreement. Had this been a long-term contract for coal with an oral agreement to renegotiate the price if a low-cost strip mine should open, or a contract to build a skyscraper with an oral agreement to renegotiate the number of stories if the real estate market should collapse, the agreement could be enforced.

But not when the commodity is labor, the majority says. If my colleagues thought there was some problem with the feeble enforcement of the parol evidence rule in modern litigation, I would share their concern. The parol evidence rule and the statute of frauds reduce the costs of fabrication, litigation, and error—at the expense of making the bargaining process less flexible and withholding enforcement of some bargains. Most courts today think the costs of strict insistence on written instruments excessive. Whether they are right in believing this is an interesting question. What the majority does, however, is not signal a revival of the writing requirement; it maintains, instead, that labor law is different. What, then, is the source of the difference?

My colleagues point to "national labor policy", which they say mandates that "collective bargaining agreements must be more secure than garden variety contracts." Slip op. at 8. Labor policy may be found in labor statutes. It turns out that the National Labor Relations Act does not forbid oral agreements. Quite the contrary, the Act requires only one sort of agreement to be in writing. Pension plans must be written down, and the writings will be strictly enforced on command of both labor, 29 U.S.C. §186(c)(5)(B), and pension, 29 U.S.C. §1145, laws. See *Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (in banc). When Congress singles out one kind of agreement for a strict writing requirement (as it did to protect the interests of the pension plans, which are not present at the bargaining table),

it makes sense to infer that labor and management may decide for themselves how formal the rest of their dealings shall be. If labor policy really emphasized stability (and protection of workers from their own leaders' "backroom deals", slip op. at 20), the NLRA would require the commitment of all agreements to writing, would require leaders to submit them to vote by members, and would require the written pact to be circulated far enough in advance of the vote that it could be digested and intelligently debated. Labor law requires none of these things, as my colleagues concede, slip op. at 11. By any reckoning, ordinary commercial contracts—to which §§ 2-201, 2-202, and 2-209 of the Uniform Commercial Code apply—are more secure against disputes about oral colloquies than are labor agreements governed by §8(d) of the NLRA, 29 U.S.C. §158(d). Labor law emphasizes flexibility, not certainty.

Flexibility is a commodity negotiators value, and not only because it is impossible to write down all of the understandings and practices (even all of the "important" understandings and practices) that make up the terms and conditions of employment. Collective bargaining agreements are relational contracts. They do not settle all important terms; rather they establish a framework within which the parties compose their differences.

It is perverse to say that the contracting process in labor must be *more formal* than the contracting process in shipping or construction or natural resources. You can define how much coal to sell and where to deliver it; you can set the duration of a charter party. Labor agreements govern the ongoing relations among thousands of persons and affect matters not so easy to specify. Rigidity backfires. Competitive conditions and technology change. Labor relations must change too, even over so short a period as three years. Failure to adjust to new developments means failure in product markets (look at the automobile and railroad industries), and when the employer slips in product markets labor takes the fall. If a low-price rival enters and siphons business, a firm bound to pay high

wages will lay off many workers. Layoffs hurt the employees with the shortest tenure—that is, the persons who are plaintiffs in this case. Greater flexibility promotes responses in the marketplace that may benefit both sides.

Ongoing accommodation is a hallmark of labor relations. Representatives of labor and management meet continually to discuss both individual grievances and more general questions. Changes may ensue, with or without written agreements. "[T]he parties to a CBA [collective bargaining agreement] may tacitly acquiesce to an amendment of the agreement through their course of dealing." *Matuszak v. Torrington Co.*, 927 F.2d 320, 324 (7th Cir. 1991). Because labor and management recognize that even this process cannot be comprehensive, they deputize arbitrators to resolve still more issues. Arbitrators sometimes are limited to grievances, but more commonly their powers extend to all interpretive debates. Courts regularly say that arbitrators are not bound by the parol evidence rule, that because collective bargaining agreements are incomplete, and so much of labor relations consists in oral understandings, arbitrators may use these oral exchanges to supplement or even contradict the written terms. E.g., *SEPTA v. Railroad Signalmen*, 882 F.2d 778, 784 (3d Cir. 1989); *Loveless v. Eastern Air Lines*, 681 F.2d 1272, 1279-80 (11th Cir. 1982); *NLRB v. L.B. Priester & Sons, Inc.*, 669 F.2d 355, 365 (5th Cir. 1982); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union*, 611 F.2d 580 (5th Cir. 1980); *Machinists v. Sargent Industries*, 522 F.2d 280 (6th Cir. 1975); *Tolbert v. Union Carbide Corp.*, 495 F.2d 719, 721 (4th Cir. 1974). If my colleagues are right, these decisions must be wrong.

The Supreme Court has said repeatedly that labor relations require more flexibility than the common law allows—not, as my colleagues hold, more formality. E.g., *Transportation-Communication Employees v. Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966) ("A collective bargaining agreement is not . . . governed by the same old common-law concepts which control such private contracts.

. . . In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements."); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960); *McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 273-74 (1958). See also *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 308-09 (1989) (describing "flexibility" as a hallmark of labor relations under both the NLRA and the Railway Labor Act and adjuring courts not to disfavor informal arrangements).

Flexibility entails giving labor and management the option of having a fully integrated agreement, of banning oral side agreements, as well as the option of coming to partially-written, partially-oral understandings. My colleagues concede that this agreement, which lacked an integration clause, did not ban oral understandings. Our question is whether labor law forbids such side agreements even when the parties decide against an integrated writing. A handful of cases say that it does; the majority relies on *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945), and a smattering of unreviewed decisions by district courts, all more than a generation old. *Gatliff* rests in part on the premise that the NLRA "contemplates that a collective bargaining agreement be in writing", 152 F.2d at 56, which it obtained by misreading *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523-26 (1941). *Heinz* holds that it is an unfair labor practice for the employer, having reached an agreement with the union, to refuse to sign a document embodying its agreement. That labor is entitled to a written memorial of a bargain hardly shows that labor is *forbidden* to reach oral understandings with management. *Gatliff* dealt with a common problem: a member of a multi-employer bargaining unit refused to sign the pact the association reached with the union, pleading that local officials said that it would not have to. Today a belated effort to withdraw from a multi-employer unit would be dealt with as an unfair labor prac-

tice, see *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982), and not as a problem of parol evidence. After the Labor Board resolved the multiemployer unit problem in 1958, *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958), *Gatliff* vanished without a trace.[1] More recent cases in the Supreme Court (e.g., *Conrail* and *Union Pacific*), in the sixth circuit (e.g., *Sargent*), in our own circuit (e.g., *Matuszak*), and in other circuits take a different approach to contractual formalities. For example, the fifth circuit believes that the parol evidence rule does not apply *at all* in labor law. *Manville Forest Products, Inc. v. Paperworkers Union*, 831 F.2d 72, 75-76 (5th Cir. 1987). Going to the extreme opposite from my colleagues, *Manville* said that "national labor policy" forbids

[1] My colleagues think it significant that I have not found a case disapproving *Gatliff* by name. Guilty as charged. Plea in mitigation: As other courts take no notice of *Gatliff*, there are no citations to collect. The Supreme Court has never cited *Gatliff*. No court of appeals has cited it since 1964, when *Lewis v. Owens*, 338 F.2d 740, 742 (6th Cir. 1964), pointedly declined to rely on it. *Gatliff* has been cited by courts of appeals a total of three times; *Clothing Workers v. NLRB*, 324 F.2d 228, 231 (2d Cir. 1963); *Lewis v. Lowry*, 322 F.2d 453, 456 (4th Cir. 1963) (in banc), and *Owens*. *Lowry*, like *Owens*, cites *Gatliff* without endorsing its conclusion that labor policy bars oral agreements that would be permitted by the parol evidence rule. *Clothing Workers* includes *Gatliff* in a string citation for the proposition established in *Heinz*: that the employer must sign a formal document if the union demands one. *Gatliff*'s conclusion that an employer may not withdraw from a unit after agreement has been reached is unimpeachable, given *Bonanno* and *Retail Associates*. The reason *Gatliff* gave has been abandoned, and the one that replaced it in *Bonanno* and *Retail Associates* does not assist the plaintiffs. A natural person missing for seven years is presumed dead. Justice Holmes remarked that "the reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view." *The Path of the Law*, 10 Harv. L. Rev. 457, 458 (1897), reprinted in *Collected Legal Papers* 167, 169 (1920). *Gatliff* has been missing for seven years plus a generation, which speaks more eloquently than express disapproval.

labor and management to have a fully integrated contract no matter how strongly they prefer the benefits of certainty.[2] See also *Westinghouse Elevators of Puerto Rico, Inc. v. S.I.U. de Puerto Rico*, 583 F.2d 1184 (1st Cir. 1978); cf. *Bokunewicz v. Purolator Products, Inc.*, 907 F.2d 1396, 1401-02 (3d Cir. 1990). I am no more enamored of an approach that dishonors attempts to put everything in writing than I am of an approach that dishonors oral agreements when the parties did not want their writings to be complete. There is a happy middle ground: Parties may choose for themselves.

This sets up the majority's argument that the union *did* choose to exclude oral agreements, by requiring ratification of the pact by the membership. Technically, the argument is that the union's negotiators lacked *actual* authority to agree to a reopener, because the union's constitution requires ratification, and they lacked *apparent* authority because Jewel not only knew about this requirement but also understood that the union's negotiating team was not

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[2] The majority insists, slip op. at 18-19 n.4, that cases such as *Manville* "hold only that parol evidence may be considered to resolve ambiguities or fill-in gaps in a written collective bargaining agreement." This is the argument from triviality. More to come in the text below. Two observations here: First, none of the other courts of appeals believes that this matters. Second, I am baffled by the refrain that a reopener is specially grave because it "conflicts" with "fundamental" provisions of the agreement. With what provision does it conflict? If the reopener had been written down we would not say that the contract had an internal contradiction. A reopener is an option to bargain in mid-term, and options do not "conflict" with the provisions that control in the event they are not exercised. At all events, what I find significant about these cases is not that their subjects are grave or trivial, but that these courts hold that oral agreements trump written ones. The writing in *Manville* contained a zipper clause—language specifying that the pact was fully integrated and waiving all right to bargain during the term of the agreement. The court of appeals held that such a clause may be ignored. That is why these cases represent the polar opposite to the majority's position. They say that the parties *cannot* achieve an integrated collective bargaining agreement.

going to tell the membership about the reopener. Notice that this argument does not supply any reason to differentiate labor law from other bodies of law. "Agreement" by an agent lacking both actual and apparent authority is empty in all corners of the law. Claims about how labor law is special melt away if, in the end, this case is about the negotiators' lack of authority.

Four issues precede the question whether defects in the ratification process prevent enforcement of the reopener. First: do provisions of a union's constitution affect the validity of labor agreements? The National Labor Relations Board thinks not. *McLaughlin & Moran, Inc.*, 299 N.L.R.B. No. 7 (1990), holds that once the responsible officials of a union report to the firm that the union has approved an agreement, it is binding—even if the union did not follow prescribed procedures. The Board wrote that "it is none of the Employer's business how (or even whether) the [Union] obtains the employees' approval" of the agreement, and that "it is for the union, and not the employer, to construe the meaning of the union's internal requirements for ratification." Any other approach, the Board thought, would make it "difficult, if not impossible, for the parties to a collective-bargaining agreement to arrive at a final settlement without the fear of being forced into protracted litigation regarding the union's compliance with its own procedures, clearly a collateral issue. The encouragement of such industrial instability could not have been with the intendment of the Act." *McLaughlin & Moran* reiterates a doctrine the Board has applied for decades. E.g., *NLRB v. M&M Oldsmobile, Inc.*, 377 F.2d 712 (2d Cir. 1967); *Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 211-12 (6th Cir. 1967); *NLRB v. Darlington Veneer Co.*, 236 F.2d 85, 88 (4th Cir. 1956). *Darlington* holds that the union's ratification procedures affect the validity of the agreement only to the extent the employer accepts them; otherwise labor law makes the word of the negotiators the union's bond. To put this differently: Labor's negotiators *have* authority, as a matter of federal law, no matter what the

union's internal procedures may be. This principle is conclusive against plaintiffs. I cannot find any contrary holding. Yet my colleagues, who extoll the importance of stability, also promote the sort of litigation regarding internal union procedures that, the Board and other circuits believe, undermines stability.

Second: if contrary to *McLaughlin & Moran* the union's procedures matter, did Jewel know that the union's rules required ratification term-by-term, and that the local's officers would keep one term under wraps? Unless Jewel knew, the union's officers acted with apparent authority. Jewel denies having this knowledge, and the jury's verdict hardly resolves this question against it. The majority distinguishes *McLaughlin & Moran* because that employer lacked knowledge of union's internal rules while ignoring Jewel's protest that it was in the same position. At all events this factor plays no role in the Board's analysis or that of other circuits.[3] Third: does a defect in ratification apply exclusively to the oral portions of the

[3] In *Houchens*, for example, the union initially told the employer that "any contract proposal or recommendation would be subject to approval by the employees." 375 F.2d at 209. When the negotiators reached agreement, the company said it would await the employees' approval. At this point the union's negotiators insisted that the company implement the agreement without the employees' approval; the company balked; the Board found that the company had committed an unfair labor practice; the court of appeals enforced the order, explaining: "The purpose of collective bargaining is to fix wages, hours and conditions of work by a trade agreement between the employer and his employees. . . . This can be done satisfactorily only if a bargaining agent is selected to represent all the employees with full power to speak in their behalf. The purpose of the statute would be largely frustrated if the results of bargaining must be submitted to a vote of the employees, with all of the misunderstandings and cross currents that would inevitably arise in an election of that sort." 375 F.2d at 212, quoting from *Darlington Veneer*, 236 F.2d at 88. The reasons given in *Houchens* and *Darlington Veneer* sound remarkably like the reasons in my colleagues' opinion—except that the outcomes are diametrically opposed.

agreement? Why should Jewel be bound by the provisions favorable to the union (those the union's officers told the members about) but be unable to avail itself of the provisions favorable to itself? Ratification, one would think, is an all-or-nothing business. Fourth: why is Jewel, as opposed to the union, answerable to persons injured by defects in the ratification process? As the majority paints this picture, the union's officers set out to hoodwink the members by keeping under wraps a reopener agreement that the members would oppose. Such a wrong sounds distinctly like a breach of the duty of fair representation. Yet three years ago this court held that these plaintiffs may not recover from this union on such a theory. 848 F.2d 761. Suppose the majority could surmount these obstacles. More remain.

Nothing in the union's constitution requires the officers to submit written documents to the members for perusal before a vote. This local does not circulate agreements to its members. Once the negotiating team reaches an agreement with management, the officers call a meeting at which they recount the terms they think significant. They are free under both the international union's constitution and their own practices to trumpet the features they deem salient while overlooking concessions to management. Of course members may ask questions during debate, but there is no indication in this record that anyone asked whether the agreement included a reopener, let alone that the officers answered falsely. Treating a ratification requirement as if it were a writing requirement is a serious misstep.

Practice illuminates how the union understood the meaning of ratification. The jury found—as the parties agree—that union and management routinely left matters including the number of personal days off and details of the seniority system to oral agreements that were not described to the members before ratification. Judge Posner asked the jury to decide whether under the parties' practice an agreement had to be written in order to be valid.

The jury determined that writing was unnecessary. My colleagues deem details such as seniority and days off to be trivial—questionable as an original matter, but no ground for upsetting the jury's contrary decision on the same point.

Especially not when one of the examples presented to the jury was—another oral reopener agreement! The trial judge wrote:

> Merk's argument from triviality is contradicted by the evidence of a reopener agreed to in 1969. That agreement was premised upon a raid, not by Cub Food, but by the Teamsters, and allowed the contract to be reopened to renegotiate *higher* wages. If the jury concluded that there was an agreement to reopen the contract in 1969, as it could have, and that that agreement was not ratified, then the agreement in this case was no more significant to Jewel than the 1969 reopener was to the Union, and could be valid even if unratified.

1990 U.S. Dist. LEXIS 5486 at *13-14 (emphasis in original). Given the protection the seventh amendment accords to jury verdicts, you would think this evidence conclusive. But no; the majority says that the 1969 reopener is different because "the 1969 provision furthered the interests of *all* parties: Jewel benefited by keeping the Teamsters out of its stores, the Union benefited by retaining its membership and the members benefited by gaining a possible raise in salary." Slip op. at 14 (emphasis in original). This sounds more like a lawyer's closing argument to a jury than like a reason why the jury's verdict must be set aside. After page 7 of the majority's opinion (where it concludes that the jury could enforce the oral reopener under the rules usually applied in civil litigation), you do not encounter the word "jury" again. My colleagues make *de novo* findings on all factual disputes and draw their own inferences.

Disposing of a raft of oral agreements on the ground that they are trivial, and of a vital oral agreement on the

ground that it could propel wages upward, supports a decision for these plaintiffs only at substantial damage to other values. Recall that the majority started from the premise that "collective bargaining agreements must be more secure than garden variety contracts." Slip op. at 8. How is the agreement "more secure" if labor and management cannot know whether it is binding until they obtain the views of three appellate judges on how "important" it is? Importance lies in the eye of the beholder (I think that seniority provisions do not belong in the "trivial" class to which my colleagues consign them). Worse, the majority makes it clear that enforceability depends on who wins and who loses *ex post*. Negotiators need to know *while they are dickering* which agreements will be enforced and which not; people at the bargaining table in January 1983 cannot wait for a court in September 1991 to tell them which deals are sufficiently unimportant, and which turn out sufficiently favorable to the workers, to be enforced.

Consider again the position of the parties when Jewel was insisting on the most-favored-nations clause. What options had they?

- They could have reached impasse, followed by Jewel's implementation of its final offer (including the most-favored-nations clause), which might have precipitated a strike. All workers either would have been subject to the most-favored-nations clause (if they continued to work on Jewel's terms) or would have lost wages during the struggle. Jewel might or might not have been able to "break" the union during a strike.
- They could have signed an agreement with a most-favored-nations clause. The membership might have ratified this (with results less favorable to the employees than what actually happened) or might have rejected it (with the same results as impasse).
- They could have signed an agreement with a written reopener. The membership might have ratified

this (with results less favorable to the employees than what actually occurred—recall that uncertain enforceability of the oral reopener led Jewel to compromise with the union) or might have rejected it (with the same results as impasse).

- They could have signed a one-year rather than a three-year agreement, with effects fundamentally the same as a three-year agreement plus a reopener.
- They could have signed a three-year agreement without a reopener, but with lower salaries and benefits to compensate Jewel for the risk it was taking.
- They could have signed precisely the agreement they did, without a reopener. After the low-price rival entered, Jewel could have laid off workers on account of lower sales.

None of these is a clear winner for the employees, whose pickle is attributable not to faithless agents but to impending competition in the market. All options are potentially inferior for the employees to the solution the union negotiated. Bargains usually yield benefits for both sides. The union's agents believed that this deal with Jewel was the best one available. It was at *the union's* behest, not Jewel's, that the reopener was oral rather than written. My colleagues concede all this but reply: "[I]t is not for us to decide whether the reopener would have ultimately benefited or harmed the Union membership." Slip op. at 16. This is the wrong question, for we are not trying to determine who won or lost, but whether the 1983 reopener is sufficiently like the 1969 reopener that a jury could conclude that the parties' practice did not require its presentation to the membership in writing. That question is indeed "not for us"; it is for the jury, and we do not learn why the jury could not find the two reopeners sufficiently similar. Suppose, though, that the distribution of benefits were the right question, and judges the right persons to answer it. Why may we not "decide whether the reopener would have ultimately benefited or harmed the union membership" when, two pages earlier, we make

exactly that decision about the 1969 reopener? Either we may inquire into this subject or we may not. If we may, we should examine both reopeners; if we may not, neither. Finding benefits for the union in the 1969 reopener while disclaiming any power to search for benefits in the 1983 reopener is tellingly inconsistent.

Neither the parol evidence rule nor the union's ratification requirement vitiates an oral reopener agreement. My colleagues fuse two unsatisfactory theories: "Taken individually . . . none of plaintiffs' arguments may be dispositive. Read together, however, they clearly illuminate the grave dangers posed by a backroom deal that is secretly negotiated between union officials and company management without the knowledge or consent of the union rank and file." Slip op. at 20. Here the majority announces that the 1983 reopener was *bad* for the employees—despite its disclaimer at page 16 of authority to inquire into this question. This is special pleading. Reopeners are OK when they help the employees (page 14) but not when they help the employer (page 20). Such a disposition bears no resemblance to a rule of law. It is a thumb on the scales of justice.

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APPENDIX C

United States District Court
Northern District of Illinois
Eastern Division

KELLY MERK, JOSEPH STASZEWSKI, VICKIE MENAGH, DONNA McCORMICK, DAVID THERKIELD, JOHN MALONE, MARLENE WAGNER, MICHAEL DEMARE, WAYNE VOLKER, ELEANORE COLLINS, ANDREW KACHIK and PATRICIA TODD, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JEWEL FOOD STORES DIVISION, JEWEL COMPANIES, INC., AMERICAN STORES COMPANY, INC., and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 881, Chartered by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO and CLC,

Defendants.

NO. 85 C 7876

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

This case presents difficult labor law issues which appear to be of first impression. The plaintiffs are part of a putative class of former supermarket employees of defendant Jewel Food Stores ("Jewel"). Their three-count complaint under § 301(a)

of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a),[1] while pleading alternative and inconsistent claims for relief, seeks one remedy—payment of back wages which Jewel allegedly owes plaintiffs under a collective bargaining agreement. Counts II and III are against Jewel and the defendant Union respectively, and together comprise the familiar "hybrid" suit. These counts rest on the existence and breach of a duty of fair representation owed to plaintiffs by the Union. Count I is a direct § 301 claim against Jewel only; it rests on the alternative theory that the Union owed no duty of fair representation to these former employees. The Union has moved for summary judgment on Count III, arguing among other things that it owed no duty to plaintiffs. For the reasons stated below, we agree with the Union and must necessarily dismiss the entire hybrid part of the suit, that is, both Counts II and III. We also have before us Jewel's motion to dismiss Count I, which argues that the direct suit is barred by the six-month statute of limitations set forth in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983). For the reasons stated below that motion is denied.

I.

The following facts appear to be undisputed. On October 20, 1983, the Union and Jewel entered into a three-year collective bargaining agreement which was effective retroactive to September 19, 1982, and ran to June 15, 1985. Jewel runs about 180 supermarkets in and near Chicago employing some

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[1] That section reads:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

16,000 workers represented by the Union. In January 1984 the Union and Jewel started haggling over a modification of the agreement. Jewel says it believes that the Union had agreed orally in 1982 to reopen the contract for negotiation when the discount "Cub Food Stores" chain was to begin operations. Jewel says that under this oral "reopener" agreement it had the right to unilaterally implement any final offer it made, if the "reopened" negotiations reached impasse. The Union says it made no such agreement, but agreed to meet with Jewel in January 1984 to discuss a proposal by Jewel to cut wages and benefits.

These negotiations got nowhere, and on February 26, 1984, in accordance with what it called its "final offer at impasse," Jewel unilaterally cut wages and benefits below levels specified in the 1982-85 Agreement. The wage cuts were as high as $1.25 per hour, and vacation and personal day benefits were reduced as well. The Union demanded arbitration;[2] Jewel refused and so the Union sued Jewel to compel arbitration. *United Food & Commercial Workers Union, Local 881 v. Jewel Food Stores Division, Jewel Companies, Inc.*, No. 84 C 1648 (N.D. Ill.). The Union also lodged an unfair labor practice charge with the National Labor Relations Board ("NLRB").[3]

In December 1984, the NLRB urged Jewel and the Union to try to negotiate a settlement. The parties met and did not agree. However, the Union submitted Jewel's offer to the rank

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[2] Article IX of the Collective Bargaining Agreement contains the grievance and arbitration clauses the parties agreed to. Section 9.2 sets forth a three-step grievance procedure which appears largely informal. Section 9.3 allows either party to demand binding arbitration if the grievance procedure fails.

[3] On March 13, 1984, the NLRB's Regional Director dismissed the unfair labor practice charge. The Union appealed to the Board's General Counsel, who on September 7, 1984, sustained the appeal and instructed the Regional Director to issue a complaint. The Director did so, and a hearing was scheduled for June 24, 1985, before an Administrative Law Judge. Because of the parties' settlement, this hearing never took place.

and file, who followed the Union's recommendation to reject the offer. Negotiations continued into the spring.

On April 9, 1985, the District Court granted the Union's motion for summary judgment and ordered Jewel to arbitrate. Jewel filed a notice of appeal. Before anything came of the court proceedings, however, the Union and Jewel began more intense and fruitful negotiations. In light of the imminent expiration of the Agreement on June 15, 1985, they combined negotiations over the wage and benefit cut with talks over a new collective bargaining agreement. After a few meetings, Jewel proposed a settlement on May 19, 1985, which would restore most of the wages and benefits to their previous level and also would provide full retroactive pay for wages lost because of the cuts. However, this latter offer extended only to employees *then* on the payroll. The Union submitted the proposal to the membership and recommended acceptance. On June 21, 1985, more than 80% of current employees voted to ratify the new contract and the settlement agreement. As a result, the parties dismissed the Court suit and asked the NLRB to drop its proceedings, which it did.

The plaintiffs are part of a putative class, containing perhaps as many as 2,000 members, of former Jewel employees who were not part of the above settlement. The class includes employees who retired, who quit or who were fired at various points during the fifteen months of the protracted battle. That the class should be so large is not surprising, since turnover is, we presume, normally high in the supermarket industry. Because the settlement included only employees of Jewel as of June 21, 1985, plaintiffs received no retroactive pay for the time they worked during the dispute at the reduced salary. Since they were former Jewel employees and ex-members of the Union, they could not and did not vote on the June 21, 1985 settlement; nor could they wield political power within the Union. They were not notified of the proposed resolution and, specifically, were not told that the resolution would not include them. They must have learned about it somehow,

though, because they filed this suit on September 10, 1985, less than three months following the settlement.

Counts II and III form a traditional "hybrid" suit in the mold cast by *Hines v. Anchor Motor Freight*, 424 U.S. 554, 96 S.Ct. 1048 (1976) and *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967). Count II alleges that Jewel breached the 1982-85 Agreement by cutting plaintiffs' wages; Count III alleges that the Union breached its duty of representing plaintiffs fairly when it reached a settlement which left them high and dry. The twist in this case, though, is that plaintiffs were former employees when the settlement was reached. They claim, in the alternative, and the Union agrees, that the Union owed no duty to these former members. To protect themselves, plaintiffs amended their original complaint to add an alternative theory in what is now Count I, a direct suit under § 301 against Jewel only.

The first issue is whether the Union owed the plaintiffs a duty of fair representation after they left Jewel. While the Union and the plaintiffs agree that no continuing duty existed, we still must decide the question, since Jewel claims that the duty existed. All parties apparently agree about the legal and practical consequences of our decision on this issue. If Jewel is right that the duty existed, then plaintiffs are limited to their hybrid suit in Counts II and III, and we must grant Jewel's motion to dismiss the direct suit, Count I. This result would favor Jewel and hurt the ex-employees, since to recover they would have to carry the substantial burden of showing in Counts II and III that the Union breached its duty of fair representation. However, if the plaintiffs and the Union are right that the duty vanished when plaintiffs did, then plaintiffs will proceed on Count I only. To recover the plaintiffs would need only show that Jewel breached the contract; with the Union out of and irrelevant to their claim, their task would be lighter and Jewel's exposure greater.

This latter result, which we reach below, raises a second issue. We must decide whether the six-month statute of limitations of § 10(b) of the NLRA applies to the direct suit. We will take up the two issues in order below.

II.

The duty of fair representation is a creature of the judiciary, created as a necessary complement to the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* The duty exists because the NLRA makes certified labor unions the exclusive bargaining representative of all employees in the bargaining unit. *See Frandsen v. Brotherhood of Railway, Airline and Steamship Clerks*, 782 F.2d 674, 678-79 (7th Cir. 1986). Since the policy of exclusivity strips employees of normal methods of redress, for their protection, the employees' exclusive representative, the Union, necessarily has the duty "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909 (1967). However, this duty of fair representation extends no further than the Union's authority under § 9(a) of the NLRA, 29 U.S.C. § 159(a), to act as the exclusive representative of the bargaining unit. *See, e.g., Freeman v. Local Union No. 135, Chauffeurs, Teamsters, Warehousemen and Helpers*, 764 F.2d 1316, 1320-21 (7th Cir. 1984). Thus, if the Union is not the exclusive representative of an employee, it has no corresponding duty to represent that employee fairly or at all. *See id.* at 1321.

The Union's authority to be exclusive representative is created and defined by the NLRA, and this authority exists only if a majority of "employees" in a "unit appropriate" for collective bargaining have elected the Union to be their exclusive representative. *See* § 9(a), 29 U.S.C. § 159(a). The Act defines "employee" in § 2(3), 29 U.S.C. § 152(3) as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a

> particular employer, unless this chapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .

The employer has a duty to bargain only with the Union representing "his employees" about wages, hours and the terms and conditions of employment. *See* 29 U.S.C. § 158(a)(5), § 158(d).

The plaintiffs and the Union make a simple and persuasive argument based on the above standards and definitions. When plaintiffs left Jewel, they were not "employees" of Jewel any longer, not "his employees," but ex-employees. Moreover, they were ex-members of the bargaining unit. They no longer paid dues and exercised no power within the Union. Not only would it defy common sense to make the Union exclusive representative of departed employees, it would be unfair to the ex-employees and the Union to do so. If the duty of fair representation lingered after the plaintiffs left Jewel, they would have been subject to the Union's exclusive representation but have had *no* control over their representatives. Unlike current employees who can vote against proposed contracts they do not like, vote against Union officers they do not like or try to decertify the Union altogether, the ex-employees would be stuck with a representative who is not beholden, and therefore unresponsive, to them.[4] If the duty existed, the Union would

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[4] While this whole line of argument might appear circular, it is not. In the argument, we have assumed that the ex-employees have lost their right to vote on contracts, for union officers and so on. Such an assumption (which Jewel nowhere disputes) implies that the ex-employees are no longer Union members, which is exactly the conclusion we are seeking to determine. In other words, one might say it is circular to prove that there is no duty of fair

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be forced to deal with an intolerable conflict of interest between its simultaneous duty to current and ex-employees. It would inevitably sacrifice the interest of ex-employees in order to satisfy current employees, who wield present and future power in the Union. To hold that the Union had a duty to continue representing plaintiffs would be tantamount to holding, that it had a duty to achieve the impossible.[5]

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[4] representation by asuming that ex-employees are not Union members since that essentially assumes the conclusion. One might instead argue that plaintiffs *did* have the right to vote and participate in Union affairs, but no one knew it, and so they were unlawfully deprived of a chance to participate in the ratification of the contract.

But we have not improperly assumed our conclusion. As our discussion below of the *Allied Chemical* case makes clear, once they left these ex-employees could not properly remain part of the collective bargaining unit. Indeed, Jewel is not in fact claiming *both* that the Union owed a duty of fair representation to plaintiffs *and* that the plaintiffs were still Union members with a right to participate in Union affairs. Indeed, if Jewel were so arguing, there probably would have been a breach of the duty, since plaintiffs were not notified of or given a chance to vote on the June 1985 settlement. Instead, although Jewel does not say so, Jewel appears to be arguing implicitly that a residual duty of fair representation lingered as to *ex*-members of the Union, who had no corresponding right to participate in a settlement which left them high and dry. Jewel therefore appears to be arguing the plaintiffs were second-class Union members, bound to accept the consequences of the Union's exclusive representation but stripped of normal participatory rights accorded active employees. Jewel cannot have it both ways. If the duty existed, then plaintiffs were improperly denied the right to take part in the process of ratifying that settlement. If the plaintiffs were not Union members, then a direct rather than hybrid suit is warranted.

[5] The Union's brief in support of its motion for summary judgment, at 11, illustrates that plaintiffs would inevitably be sacrificed if they remained part of the unit and that the Union could not accommodate both factions:

> Even if it may be said that some lingering duty of fair representation remains in the case of former employees,

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None of the parties cited any cases on point. However, the plaintiffs did cite a few cases which are analogous to this case. Most important is *Allied Chemical & Alkali Workers of Americal, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383 (1971), where the Court held that "retirees" are not "employees" as defined in § 2(3) of the NLRA. The Court also held that the retirees "were not and could not be 'employees' included in the bargaining unit." 404 U.S. at 172, 92 S.Ct. at 394. The Court reasoned that the NLRA's scheme requires that a bargaining unit include only employees with mutual interests in the terms and conditions of employment. "Such a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit." *Id.* at 172-73, 92 S.Ct. at 394. The Court emphasized that the inclusion of retirees with current employees in one bargaining unit creates a serious conflict of interest rendering such a unit unworkable: the retirees are interested primarily or exclusively in pension-related issues, and *not* in the full range of issues of interest to current employees, such as wage rates,

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> [8] it must be obvious that the Union's paramount duty is to the working membership and not to those who terminated their employment. In all its actions the welfare of the current membership must be the Union's controlling consideration. In achieving for the current membership a new contract, the Union discharged its primary and paramount responsibility. Indeed, its responsibility to the current membership so greatly outweighs any responsibility it might have to former employees that the Union was under an affirmative duty to present the settlement proposal to the membership even if it did not favor the proposal. A breach of the duty of fair representation could very well have occurred if Local 881 had refused to present Jewel's proposal to the membership for its acceptance simply because the retroactive pay portion of the proposal did not apply to former employees.

hours, working conditions, etc. With such a narrow interest at odds with other interests, retirees would "create the potential for severe internal conflicts that would impair the unit's ability to function and would disrupt the processes of collective bargaining." *Id.* In addition, there is the great danger that the Union would favor active employees over retirees. *Id.*

The retirees and other former employees in this case are analogous to the retirees in *Allied Chemical*. Whether or not they remained "employees" under § 2(3) of the NLRA, they were no more proper members of the bargaining unit once they left Jewel than were the retirees in *Allied*. The potential conflict of interest in such a situation is great, and, in fact, the record suggests that fears of a conflict of interest proved well-founded in this case.[6] Once they left, the plaintiffs had *one* narrow interest—recovering lost wages. The employees left behind had a much broader range of interests, including obtaining good future wages and working conditions, as well as securing future peace and stability in the form of a new collective bargaining agreement. The current employees had everything to gain and nothing to lose by cutting plaintiffs loose without a remedy. In leaving plaintiffs out of the agreement they gave up nothing of economic value to themselves, but gave Jewel an economic plum. Because Jewel apparently took a hard line as to plaintiffs, current employees could not have helped

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[6] The Union argues repeatedly in its briefs that its obligations to active employees gave it no choice but to throw plaintiffs overboard. This happened despite the apparent fact that Union President Ron Powell told Union members that those who left the membership would be protected. But Union leaders testified in their depositions that when push came to shove current, not former employees, were their "primary concern," and that they "bargained away a claim of people who had left our membership in favor of what we thought was a better offer for people who were part of our membership." Deposition of Thomas Walsh at 63. It appears that the Union tried initially to get the back pay for plaintiffs, but "bargained them away" when Jewel took a hard line as to plaintiffs in the final stages of negotiation.

plaintiffs without hurting their own position. This is a classic case of conflict of interest. If plaintiffs indeed remained part of the bargaining unit, they were nothing but a bargaining chip and helpless to prevent their former brothers and sisters from reluctantly tossing them onto the bargaining table.

Both of the factors *Allied Chemical* highlighted as important to a proper bargaining unit—coherence necessary for efficient bargaining and the lack of a submerged, distinct minority group—are relevant here. The plaintiffs were not and could not have been involved in the collective bargaining for a new contract, yet their sole interest would have become enmeshed in that process had they remained part of the unit. The parties very sensibly collapsed the negotiations over the wage cut with those over a new agreement. But plaintiffs could only have hindered that bargaining process if the Union had to account for and stand behind their interests. That is precisely why the Union gave up on plaintiffs' claims. *See* nn. 5 & 6 above. Moreover, our above discussion makes clear that if plaintiffs were indeed lingering members of the Union for the one purpose of their wage claim, they were indeed an isolated and submerged minority sect. The rationale of *Allied Chemical* argues against this result, and Jewel does not adequately deal with this rationale in its briefs. Following *Allied Chemical*, then, we hold that the plaintiffs were no longer proper members of the bargaining unit when they left Jewel.[7] They were like any other worker who quits a company—an ex-employee and ex-

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[7] A few other cases support this result as well. *See* Auto Workers v. Yard-Man, Inc., 716 F.2d 1476, 1484-85 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) (Union owes no duty to retirees and retirees may resolve disputes over vested benefits directly with employer); Anderson v. Alpha Portland Industries, Inc., 752 F.2d 1293, 1296-1300 (8th Cir. 1985) *(en banc)* (retirees need not exhaust grievance or arbitration procedures for dispute over vested contractual benefits since they are outside of the the collective bargaining relationship), *cert. denied*, 105 S.Ct. 2329 (1985).

Union member. As we have seen, it would have been unworkable to define them as lame duck members of the unit for the sole and limited purpose of waiting for a settlement. It follows from this that the Union owed plaintiffs no duty of fair representation.

Jewel argues that the analysis above overlooks a crucial distinction between the retirees of *Allied Chemical* and the retirees and other former employees of this case. There, as in other cases cited above in n.7, the employer allegedly harmed the retirees *after* they had already severed their employment by retiring. In contrast, here all the plaintiffs were by definition active Union members under the Union's yoke, when Jewel cut their wages. When this happened the Union protested on plaintiff's behalf and sued to compel arbitration. Jewel essentially argues that once properly subject to the Union's efforts, plaintiffs were bound to the results of this process no matter how long it took and what changed in the meantime. Jewel relies on an analogy to the common situation where a Union must represent a discharged employee to try to get him or her reinstated, even though such an employee no longer works for the employer or pays Union dues while waiting for the outcome of the grievance.

Jewel's analogy suffers from several flaws. First, and most importantly, Jewel dances around the serious and inherent conflict of interest implicated in this case. In the typical case of one or a few discharged employees, there are simply no profound, inevitable conflicts, although some rather minor ones may sometimes appear. In this respect, the Union's reliance on *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1475 (7th Cir. 1985) is misplaced.[8] It is one thing to say that the Union owes a

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[8] *D'Amato* involved the Union's duty to a probationary employee, who is not at all like a retiree or like plaintiffs. The Court noted that a minor conflict of interest arises whenever a union represents a discharged employee. Some more junior employee could

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continuing duty to one or a few employees unjustly fired. Fullfillment of such a duty works no meaningful harm on other employees in the bargaining unit. The only ones harmed, if at all, are those with less seniority, and that harm is slight. *See* n.8 above. It is quite different to leap to a conclusion that the Union must, or even *can*, continue to represent adequately a class of up to two thousand former employees, *all* of whose narrow interests are diametrically opposed to those of *every* current employee. As we explained above, that would be like giving plaintiffs' two enemies the chance to play with plaintiffs' fate. In sum, while the Union can feasibly represent both the hypothetical discharged employees and those who remain, it could not balance the conflict between plaintiffs and Jewel's current employees.

Second, the duty to represent the discharged employee is clearly grounded in the NLRA. Such employees plainly fall within the definition of "employee" in § 2(3), which includes "any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice." No one disputes that Congress intended that a vital function of the Union would be to protect "employees" fired in breach of a collective bargaining agreement or in violation of the NLRA. But plaintiffs do not fall so plainly within the definition of employee, and, unlike the case with discharged employees, we have no clear indication of congressional intent that a Union must continue to represent ex-employees like plaintiffs.

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[8] theoretically oppose reinstatement because that would harm his or her relative seniority position. That conflict does not mean the union cannot practically discharge its duty to the discharged employee, nor does it excuse him or her from failing to exhaust grievance procedures. 760 F.2d at 1489. The serious and actual conflicts in this case dwarf the abstract and "nascent conflict" mentioned in *D'Amato*. *Id.*

Jewel's analogy also fails for a third, related reason. In the case of the discharged employee, the employee's unwelcome new status as "ex-employee" results from the employer's unlawful act of firing him or her. That is, the *employer* makes the employee an erstwhile employee; the breach of contract or unfair labor practice confers the new status. The ensuing grievance centers around the employee's status: will she be *un*employed or *re*-employed? In sum, the wrong ruptures and the remedy repairs the employment relationship. Because the existence of this relationship is the very issue in dispute and, indeed, lies at the intersection of the collective bargaining and employment relationships, the employer cannot conclusively make the employee an ex-employee and ex-member of the Union simply by "terminating" him or her. The employment status remains unresolved until the dispute is resolved. In contrast, the dispute in this case does not involve plaintiffs' status as "employees" of Jewel or as "members" of the Union. Win or lose, they are and will remain *former* employees with no continuing ties to Jewel. Because plaintiffs' employment status is already long resolved, Jewel incorrectly equates them with discharged employees seeking reinstatement. Indeed, this distinction between former employees who do not want to return and discharged ones wanting their jobs back partly explains the deep conflict of interest detailed earlier. The interests of fired employees generally harmonize with those of current employees, and coincide if they get their remedy. Their long-term interests are very much in line, and thus the Union must represent discharged employees unless and until they lose their grievance. But in seeking their remedy plaintiffs have aligned themselves against the interests of *all* current employees. They seek only one thing and share no long-term interest with current employees. They simply do not properly belong in the bargaining unit.

Jewel also argues that plaintiffs' argument runs afoul of the NLRA's fundamental policy of exclusive representation. Like the previous argument, this contention sidesteps the con-

flicts of interest in this case. As *Allied Chemical* shows, "exclusive representation" does not mean "all-inclusive exclusive representation." Rather, only "appropriate" units may be certified. Our result is consistent with the policy of exclusive representation as it defines a unit for which exclusive representation can work appropriately. We have frustrated the NLRA's policy no more than *Allied Chemical* did.

We must emphasize the narrowness of our holding that the Union owed no duty of fair representation to plaintiffs when the settlement was reached. It depends *both* on plaintiffs' status as ex-employees of Jewel *and* on the serious conflict between their narrow interest and the interest of other employees.* Neither side cited, and we did not find, any case like this one, and given the rare circumstances, we think Jewel cries wolf when it laments that "[a]cceptance of Plaintiffs' position in this regard would effectively preclude management from *ever* relying on a Union resolution of a grievance for *anyone* that was not currently employed. Management would be deprived of the benefit of its contractual bargain, and the collective bargaining relationship would be seriously undermined." (Emphasis added.) Our holding carries no such broad ramifications. As we have described, our reasoning does not apply to employees fired in violation of a collective bargaining agreement. In any event, Jewel has not shown that it "relied" on Union resolution of the grievance *on behalf of* plaintiffs. The evidence suggests that Jewel insisted that plaintiffs be cut loose. The Union was not legally plaintiffs' exclusive agent any longer, and it appears that the Union reluctantly abandoned plaintiffs at Jewel's insistence. If Jewel "relied" on anything, we suspect it relied on its own bargaining gamble that it could save a great deal of money by trying to

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* Thus, we need not decide what would happen if, say, Jewel picked on only one or a few employees, cutting their wages, and these employees left Jewel over time. There is no systemic conflict in such a case and no necessary trade off by current employees negotiating a new contract.

bind plaintiffs to a deal in which they were as a practical matter unrepresented and powerless. If Jewel thought it could profit by the inherent conflict of interest in this case and bind plaintiffs to the result, it was simply mistaken and must live with the consequences. The new contract is not undermined as a result. Jewel simply make a false legal assumption in signing it. And far from "depriving management of its contractual bargain," our result will help ensure that Jewel lives up to its original bargain and that plaintiffs enjoy the benefit of that bargain.[10] Of course, we express no opinion now on the merits, that is, on whether there was in fact a breach which deprived plaintiffs of their bargain.

In sum, we conclude that in this unique case the Union had no continuing duty to represent plaintiffs when it finally settled its dispute with Jewel. Accordingly, the hybrid suit, Counts II and III, must be dismissed, and the employees may properly proceed in Count I against Jewel alone.

III.

We come, then, to Jewel's alternative argument that a direct suit in Count I is barred by the statute of limitations. For the following reasons, we do not think that the six-month limitations period of § 10(b) of the NLRA properly applies to this direct suit which is essentially one for breach of contract. Instead, Illinois' five-year limitations period for breach of oral contract controls this suit.

A.

The parties agree that interpretation of *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281

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[10] True, the original agreement also envisioned a private grievance procedure. But Jewel refused to abide by that procedure, so it is disingenuous for Jewel to rely on it now. In any event, the original agreement did not call for the Union to represent former employees in their grievances.

(1983), is crucial to analyzing the issue. *Del Costello* was a traditional hybrid suit under § 301, in which the employee alleged that he was discharged in violation of the collective bargaining agreement, and that the union had prosecuted his unsuccessful grievance "in a discriminatory, arbitrary, and perfunctory manner." The suit was filed just under six months after the arbitration result became final.[11] The district court dismissed the suit, applying Maryland's thirty-day limitations period for suits to vacate arbitration awards. The Court of Appeals affirmed. The Supreme Court reversed, holding that the six-month limitations period of § 10(b) of the NLRA was the most analogous and proper one for this type of hybrid suit. The Court's rationale took several steps which we shall detail.

The Court began by noting that § 301's omission of a limitations period required it to borrow a period from some other source. The norm is to borrow the most appropriate state statute of limitations, as the Court did in *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S.Ct. 1107 (1966), but the Court noted it could in unusual circumstances deviate from the norm, if borrowing a state period would frustrate or interfere with national policy. The Court carefully distinguished the hybrid suit from the "straightforward suit under § 301" in *Hoosier Cardinal*, where borrowing a state limitation for breach of contract was held proper. 461 U.S. at 162-63, 103 S.Ct. at 2289. In *Hoosier Cardinal* the union rather than the employee sued the employer over a collective bargaining agreement which had no grievance or arbitration mechanism. The *Hoosier Cardinal* Court refused to adopt a uniform federal standard, finding that the case was closely akin to a "normal" state law breach of contract suit, and as such did not directly involve "those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it." 383 U.S. at

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[11] *Del Costello* involved two consolidated cases. We are giving just one of the fact patterns here.

782, 86 S.Ct. at 1111. In contrast, *Del Costello* emphasized how the typical hybrid suit does implicate these dual consensual processes. Because the hybrid suit requires the employee to show the Union breached the duty of fair representation, it directly challenges the private settlements of disputes under the collective bargaining agreement. 461 U.S. at 164-65, 103 S.Ct. at 2290-91.

Not only is the compound, hybrid suit therefore unlike a simple contract suit, the Court felt that as a uniquely federal creature the hybrid suit has no close analogy in ordinary state law. Neither normal contract limitations periods nor those of arbitration suits fit it well. The latter periods are typically too short to protect employees who are generally green in matters of collective bargaining; and the employees' § 301 claim against the union stems from policies unrelated to those underlying the decision about a proper arbitration period. Not only are arbitration periods too short, statutes for breach of contract or for malpractice[13] are too long. The machinery for resolving Union disputes would become unstable if its resolution can be tampered with many years later. 461 U.S. at 165-68, 103 S.Ct. at 2291-92.

Finding no analogous state law period for the hybrid suit, the Court turned to and found a quite suitable period in federal law, § 10(b) of the NLRA. That section requires chargers of unfair labor practices to be brought before the NLRB within six months. The court noticed a "family resemblance" between an unfair labor practice and the breach of the duty of fair representation. Because Congress already fine-tuned this six-month period to balance the federal interest in stable bargaining and finality of disputes against the employee's interest in having time to set aside an unjust settlement, the Court found

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[13] The Court considered and rejected the argument that the duty of fair representation suit against the Union is like one for legal malpractice. *See* 462 U.S. at 167-68, 103 S.Ct. at 2292.

§ 10(b) to be an apt period for that cousin of the unfair labor practice case—the hybrid suit. 461 U.S. at 169-71, 103 S.Ct. at 2293-94. The Court stressed, however, that in applying a uniform, federal period it was taking an unusual, though not unprecedented, step, and that its "holding . . . should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy." 461 U.S. at 171-72, 103 S.Ct. at 2294.

Despite the Court's limitation of the holding in *Del Costello*, the lower federal courts have been applying *Del Costello* rather liberally in § 301 suits, and even in other labor law contexts. For example, it is probably true that *Del Costello* now applies to *any* hybrid suit under § 301, not just to suits to *vacate* a grievance, which *Del Costello* was. *See, e.g., Flores v. Levy Co.*, 757 F.2d 806, 808-09 (7th Cir. 1985) (and cases cited therein); *Taylor v. Ford Motor Co.*, 761 F.2d 931, 932 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 849 (1986). Moreover, several courts have applied *Del Costello* to suits between unions and employees under Title I of the Labor Management Reporting & Disclosure Act ("LMRDA"), 29 U.S.C. § 411-412. *See, e.g., Davis v. Auto Workers*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1284 (1986); *Vallone v. Teamsters Local No. 705*, 755 F.2d 520, 521-22 (7th Cir. 1985); *Local Union 1397 v. Steelworkers*, 748 F.2d 180, 182-84 (3d Cir. 1984); *but see Doty v. Sewall*, 784 F.2d 1, 3-10 (1st Cir. 1986); *Rodovich v. House Wreckers*, 624 F.Supp. 678, 681-93 (S.D.N.Y. 1985); *Testa v. Gallagher*, 621 F.Supp. 476, 477-78 (S.D.N.Y. 1985). However, the courts have eschewed *Del Costello* in favor of state law periods in some labor cases under § 301. For instance, a suit between an employee against a union alleging a breach of the union's own constitution was held to be essentially contractual and governed by the state law limitations period for breach of contract. *Papianni v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 11*, 622

F.Supp. 1559, 1572-76 (D.N.J. 1985). Similarly, a suit under § 301 by trustees of a pension fund against an employer for failure to contribute to the fund in violation of a collective bargaining agreement was held subject to the six-year limitations period for breach of contract. *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 167-68 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1181 (1985). And when a third party employer sues a union under § 303 of the LMRA because of a secondary boycott, a state law period for tortious interference with business relations is more analogous than § 10(b) *See Carruthers Ready-Mix v. Cement Masons*, 779 F.2d 320, 324-27 (6th Cir. 1985); *Monarch Long Beach Corp. v. Soft Drink Workers*, 762 F.2d 228, 230-31 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 569 (1985); *Park Electric Co. v. Electrical Workers*, 593 F.Supp. 1060, 1063-65 (N.D. Ill. 1984) (Plunkett, J.). Finally, a *non-hybrid* suit brought under § 301 by an employer or union to vacate an arbitration award is controlled by the state law period governing suits challenging such awards. *Plumbers Pension Fund v. Domas Mechanical Contractors, Inc.*, 778 F.2d 1266, 1268-70 (7th Cir. 1985).

As the above summary of *Del Costello* and its offspring suggests, this Court and the parties have had no better luck finding cases on point than we did when dealing with the duty of fair representation issue. However, the above cases offer some help. Viewed together, the cases show that *Del Costello* extends beyond its facts, probably to any hybrid suit under § 301, and sometimes beyond § 301; but *Del Costello* has not swallowed all federal labor disputes or even all § 301 suits. The cases share the same approach to the issue. They analyze the rationale of *Del Costello* to see whether its logic applies sensibly to the peculiarities of the case at bar. *See, e.g., Plumbers Pension Fund*, 778 F.2d at 268-70. We do the same below. While the question is close, we hold that the case resembles *Hoosier Cardinal* more than *Del Costello* and therefore a state limitation period for breach of contract controls.

B.

At the outset, we observe that the Supreme Court in *Del Costello* left the holding of *Hoosier Cardinal* intact, albeit narrowed, and emphasized that resort to state law "remains the norm for borrowing of limitations periods." 461 U.S. at 171, 103 S.Ct. at 2294. *Del Costello* deviated from the norm because of several characteristics of the hybrid suit which make it a special creature--of a species apart from the straightforward contractual dispute of *Hoosier Cardinal*. *See O'Hare*, 740 F.2d at 168 (*Del Costello* "turns on the peculiar nature of the duty of fair representation action, and cannot reasonably be expanded to all Section 301 claims that involve facts which might also have established an unfair labor practice charge.") The key to the hybrid suit is the breach of the duty of fair representation, which as we saw in Part II above flows from the federal labor policy of exclusive representation. That policy is implicated in every hybrid suit. Moreover, the hybrid suit typically challenges the result reached by the consensual process this exclusive representative, the Union, and managment have engaged in; it usually entangles either the formation of a collective bargaining agreement or, more typically, the private settlement through grievance or arbitration of a dispute under one. Congress designed the six-month period of § 10 (b) with these policies, among others, in mind.

This unique case differs from the typical hybrid suit like *Del Costello* in several fundamental ways. *No* duty of representation is involved, so, as we held above, it is a direct rather than hybrid suit. This alone makes the case look more like *Hoosier Cardinal* than *Del Costello*. But more importantly, plaintiffs fell *outside* of the normal private dispute resolution machinery. Once they left Jewel, they also fell outside of the future collective bargaining process. Regardless of how the case turns out on the merits, the private settlement that Jewel and the Union reached will remain intact and unchallenged. The active employees will have received their settlement, and both sides will continue to be bound by their new collective

bargaining agreement. Unlike the typical hybrid suit, which seeks to modify a collective bargaining agreement or to overturn a result reached through a grievance or settlement of a dispute under such an agreement, this case does not intrude on the new contract or settlement reached between Jewel and the Union. This result flows naturally from the holding that no duty of representation existed. The plaintiffs' rights and their remedy are distinct from those of current employees. In short, because plaintiffs were not part of any settlement, this case, unlike *Del Costello*, does not directly implicate "those consensual processes that federal labor law is chiefly designed to promote."[13] 461 U.S. at 163, 103 S.Ct. at 2289. Section 10 (b), which was designed to strengthen and defend the stability of bargaining relationships and to protect a collective bargaining system from delayed attack, *see United Parcel Service v. Mitchell*, 451 U.S. 56, 68, 101 S.Ct. 1559, 1567, (1981) (Stewart, J., concurring), does not pertain to this case, since plaintiffs fell out of the bargaining relationship and system and have no continuing relationship with Jewel.

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[13] We reject Jewel's strenuous argument that this direct suit will undermine the settlement. Jewel offers no legal reason that the contract is not binding. We are not dismantling that agreement. Jewel's real complaint, once again, is that its expectations were undermined, that it signed a contract thinking it had gotten away with scuttling plaintiffs' claims. But plaintiffs were simply not represented then, and Jewel tried to capitalize on that. Jewel made a miscalculation that does not let it off the hook now. Jewel also suggests that our holding means current employees will get less when the next contract comes up, and that our result therefore interferes with the collective bargaining process. This theory (or threat perhaps) is speculation. Given the uncertainties of economics, we cannot say now that our result *necessarily* means current employees will get less in the next contract. That assumes a fixed economic pie. Jewel's theory also only poses an indirect effect on future "consensual processes." We do not think attenuated effects on the process were the kinds *Del Costello* contemplated.

Papianni v. Iron Workers, 622 F.Supp. at 1572-76, offers a slightly different approach which yields the same conclusion. In holding that a suit for breach of a union's constitution is not covered by *Del Costello*, the court distinguished its case from one "absolutely predicated on the existence of an implied claim under the NLRA, or some other federally created right." *Id.* at 1575. *Del Costello* would apply to such suits with a basic "predicate" in federal law or policy–hybrid suits, LMRDA suits, suits to compel arbitration–while *Hoosier Cardinal* remains in control of straight, non-hybrid § 301 suits essentially predicated on breach of contract. *Id.* Applying this "predicate" approach, we see that this suit is not predicated on the duty of fair representation or directly on other substantive federal rights, but simply on the breach of a contract, as was the case in *Hoosier Cardinal*. To hold that *Del Costello* controls this case would be to hold, in effect, that it overruled *Hoosier Cardinal* which it plainly did not.

While this suit differs from *Del Costello* in several ways, we must acknowledge that one of the rationales underlying *Del Costello*–the federal policy favoring quick resolution of labor disputes–does argue for applying the short, six-month limitations period rather than the five-year period we apply below. But that was only one factor which motivated the court in *Del Costello* and cannot suffice by itself to demand adoption of the period of § 10 (b). If this policy alone could carry the day, § 10 (b) would apply to virtually *all* labor disputes, even breach of contract suits not analogous to suits under the NLRA. This result would conflict with *Del Costello's* admonition that borrowing from state law remains the norm, "*in labor law* or elsewhere." 461 U.S. at 171, 103 S.Ct. at 2281. Indeed, the "quick resolution" argument, if sufficient by itself, contradicts the result of *Hoosier Cardinal*, implying once again that *Hoosier Cardinal* had been implicitly overruled, even though *Del Costello* narrowed but reaffirmed the earlier case. And despite the pressure to use short limitations periods in any labor dispute, courts have not done so where the other rationales of *Del*

Costello did not apply. In sum, while a six-month period might for some reasons be desirable, the continued viability of *Hoosier Cardinal* and the Supreme Court's limiting language in *Del Costello* require the Court to borrow the state statute of limitations most analogous to this case.

C.

Plaintiffs contend that either Illinois' five-year period for breach of oral contract, Ill.Rev.Stat. ch. 110, ¶ 13-205 (1985), or the ten-year period for breach of written contract, Ill.Rev.Stat. ch. 110, ¶ 13-206 (1985), applies to this suit. While at first glance, it would seem that the latter period controls since the collective bargaining agreement is written, Illinois courts have applied the five-year statute to suits under collective bargaining agreements. *See Pratl v. Hawthorn—Mellody Farms Dairy, Inc.*, 53 Ill.App.3d 344, 347, 368 N.E.2d 767, 770 (1st Dist. 1977); *Maizer v. Florsheim Shoe Co.*, 132 Ill.App.2d 470, 472-73, 270 N.E.2d 75 (1st Dist. 1971). The courts follow common law doctrine saying that a contract is not "in writing" unless the parties to it, as well as its terms, can be learned from the document itself. If a party is not named in the contract, parol evidence must establish that the person is a party. Thus, since employees are not named in collective bargaining agreements, and parol evidence is needed to show that they are beneficiaries of it, Illinois law defines the contract as "oral" for purposes of appling a statute of limitations to a suit brought by the unnamed party. *See Pratl*, 53 Ill.App.3d at 347, 368 N.E.2d at 770. We therefore find that the five-year period is the most analogous Illinois period, since that is the one Illinois courts have applied in the rare cases where they have been called upon to resolve contract disputes involving collective bargaining agreements. Plaintiffs' suit is plainly timely under this statute.

In light of this analysis, we reject Jewel's argument that the ninety-day period found in the Uniform Arbitration

Act, Ill.Rev.Stat. ch. 10, ¶112(b) (1984),[14] applies here, for the obvious reason that no arbitration occurred involving plaintiffs. Indeed, Jewel exhibits a bit of "chutzpah" in making this argument, since it refused to arbitrate in the first place. But even if its ultimate settlement with the Union could be squeezed into the definition of "arbitration," it was not one which plaintiffs were a party to. Jewel cites no case and offers no sound reason supporting its position that the limitations period for commercial arbitrations would apply to suits where no real arbitration took place and where the plaintiffs were not party to the quasi-arbitration which happened. In any event, even if the ninety-day period were to apply, to be faithful to Jewel's arbitration analogy the only sensible starting date for the period is the day of the "arbitration decision," which can only be the day the Union and Jewel settled. Since plaintiffs sued within ninety days of that settlement, the arbitration period would not bar this suit even if Jewel were right that it was somehow relevant.

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[14] That Section reads:

> (b) An application under this Section shall be made within 90 days after delivery of a copy of the award to the applicant, except that if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

IV.

Because the Union owed plaintiffs no continuing duty of fair representation after they left Jewel, we grant the Union's motion for summary judgment and dismiss Counts II and III. We also deny Jewel's motion to dismiss Count I to the extent it is based on the fair representation issue. That motion is also denied with respect to its limitations arguments. In light of our result, we deny as moot Jewel's motion for judgment on the pleadings on Counts II and III and plaintiffs' motion to strike that motion. It is so ordered.

/s/ MARVIN E. ASPEN

Marvin E. Aspen
United States District Judge

DATED 6/26/86

APPENDIX D

D-1

United States District Court
Northern District of Illinois
Eastern Division

KELLY MERK, et al.,

Plaintiffs,

v.

JEWEL FOOD STORES, DIVISION OF JEWEL COMPANIES, INC.,

Defendant.

No. 85 C 7876

Memorandum and Order

After one week of trial, the jury in this case returned a verdict in favor of the defendant, Jewel Food Stores. I did not enter a judgment in accordance with that verdict, pending the receipt of memoranda and responses to the plaintiffs' motion for judgment notwithstanding the verdict, and in the alternative, for a new trial. With these issues now fully briefed, the motions are ripe for decision. For the reasons discussed below, I will deny both motions and enter judgment in accordance with the jury's verdict.

For purposes of these motions, the facts can be briefly summarized. In the fall of 1982, Jewel Food Stores and Local 881 of the United Food and Commercial Workers Union began negotiations on a new three year collective bargaining agreement, to run retroactively from September 15, 1982 to 1985. Of prime concern to Jewel was the expected entry into the Chicago market

of "warehouse" competitors – low price food retailers who in other markets had demonstrated their ability to capture and hold a large portion of the retail food market. In light of this concern, throughout the negotiations Jewel insisted upon various forms of a "most favored nations" clause in the contract. In essence this clause would allow Jewel to match the wages of unionized competitors opening in the Chicago market after the contract term began. The Union refused this demand throughout the negotiations, and the company refused to withdraw it.

Late in the evening of January 23, 1983, the negotiators reached an agreement and the demand for a most favored nations clause was dropped. The dispute giving rise to this case centers on the events leading up to that accord. All agree on this much: that just before agreement was reached, a hallway meeting was held between the Union president, Fred Burki, and two representatives of the company, Neil Petronella, the chief negotiator, and Marsh Collins, a corporate vice president (Fred Burki and Ron Powell, a union vice president, testified that Ron Powell was there as well) and that in that meeting an agreement was reached that paved the way for resolution of the remaining issues. But while all agree that something was agreed upon, the jury heard two very different stories about what that agreement was. According to Burki and Powell, all that was promised was that the Union would "sit and discuss" Jewel's competitive position once the prime warehouse competitor, Cub Food, entered the market; according to Collins and Petronella, Burki agreed to "an economic reopener with full reservation of rights," conditioned upon the entry into the Chicago market of Cub Food. Neither version of the agreement was reduced to writing, either because, as Burki claimed, it was unnecessary, or because, as Jewel claimed, Burki demanded that the agreement be kept in confidence.

An economic reopener has special meaning in the labor context, as Burki, the Union president, testified. Upon the happening of the condition precedent, the economic terms of a collective bargaining agreement are reopened, and both parties

have a duty to bargain in good faith to reach a new agreement. Both sides retain their respective economic weapons, and negotiations proceed as if the parties were bargaining over a totally new contract. *Speedrack, Inc*, 293 NLRB No. 128 (1989).

After the oral agreement was reached, the three or four principals returned to the bargaining table, and reported that agreement had been achieved. Witnesses from the Union testified that Burki said that in return for Jewel's dropping its demand for a most favored nations clause, the Union would agree to "sit and discuss" Jewel's competitive posture after Cub Foods entered the market. Witnesses from Jewel testified that Burki reported that in exchange for the company's dropping its demand for a most favored nations clause, the Union had agreed to a contract reopener upon the entry of the first Cub Foods into the Chicago market.

Were these conflicting stories the only evidence in the case, plaintiffs would have had a strong case. But there was more. Jewel presented negotiation notes of that last negotiation session. In labor negotiations, the testimony showed, negotiation notes are in effect the "legislative history" of the negotiations, and while the notes of the company negotiators clearly indicate that a "reopener" was agreed to, the notes of the Union officials either were missing, or destroyed, or incomplete. In a number of cases, the notes of the Union negotiators end just at the time the agreement was agreed by all to have been reached, an omission that was devastating to the plaintiffs' case.

In the fall of 1983, Cub Foods entered the Chicago market, and shortly thereafter Jewel announced that pursuant to its agreement, it wanted to reopen the contract. The Union and Jewel began the process of negotiations, but just as it got underway, an agent of the International asked to participate as an advisor to the Local. This was Peter Voeller. According to the company, once Voeller was on the scene, the negotiations took a dramatic turn for the worse. Before Voeller turned up, the Union officials had neither questioned nor denied the stated premise

upon which the negotiations rested; once Voeller was present, the Union began to deny that any "reopener" had ever been agreed to. When the Union made clear its refusal to negotiate, the company made its final offer. In February 1984, Jewel announced to its employees that pursuant to the agreement to reopen the contract reached in January 1983, it had attempted to negotiate with the Union, but that because the Union was unwilling to negotiate, it would implement its final offer. On February 26, 1984, Jewel cut the wages of its employees by as much as $1.25 an hour. The Union immediately filed an unfair labor practice complaint with the NLRB, and sued to compel arbitration.

The district court ordered Jewel to arbitrate, and the General Counsel of the NLRB eventually issued a complaint. But in May 1984, on the eve of expiration of the 1982-1985 collective bargaining agreement, the Union and the company again entered negotiations on a new contract. The dispute that had for two years consumed them was resolved within these negotiations, and the company and Union agreed to settle the dispute, Jewel agreeing to pay some backpay to the employees then working at Jewel. The unfair labor practice complaint was dropped, and the district court action dismissed as well.

The settlement between the Union and Jewel left the plaintiffs in this case high and dry. For the plaintiffs in this action are the class of employees who left the employ of Jewel, either voluntarily or involuntarily, between February 1984 and June 1985, when the settlement was effected. Local 881's agreement with Jewel did not include backpay for these plaintiffs, and in 1985, they brought this action against both Jewel and the Union to collect the back wages to which they claim they were entitled under the 1982-85 collective bargaining agreement. The action sought damages against the company for breach of contract and against the union for breach of a duty of fair representation. In a motion for summary judgment, the district court held that the Union had no duty of fair representation to former employees, and therefore that it could not have violated any duty to the plaintiffs' when it settled the dispute with Jewel. 641 F Supp 1024

(ND Ill 1986). In an interlocutory appeal, the Seventh Circuit upheld Judge Aspen's ruling, 848 F2d 761 (7th Cir 1988), and the Supreme Court denied certiorari, 109 SCt 393 (1988). The Union was therefore dismissed, and the case proceeded to trial as a breach of contract case against Jewel Food Stores.

The parties presented conflicting versions of the facts, and resolution of the conflict turned on credibility. The jury had to choose between two wholly different characterizations of that hallway meeting between Burki (and possibly Powell), Petronella and Collins. The dispute as framed was not (as the plaintiffs now hint) over what "reopener" meant in this context. The dispute was instead between the Union's claim that the word "reopener" was never mentioned in the agreement, and the company's claim that the agreement was for a reopener. The jury chose to believe the defendant. Its choice was well supported by the evidence, and would have been my choice as well. Therefore, to the extent that the plaintiffs' post-trial motions rest upon an alleged insufficiency in the evidence to show that there was a reopener agreement, they clearly must fail.

In its motion for judgment notwithstanding the verdict, Merk makes two arguments: first, that there is insufficient evidence to support the jury's finding that the contract was not fully integrated, and second, that there is insufficient evidence to show a practice of ignoring routinely the ratification requirement applicable to collective bargaining agreements.

Whether or not there was an oral reopener agreement, the first question the jury had to determine was whether the parties intended the collective bargaining agreement ("CBA") to be a complete integration of all their understandings. This was a question for the jury because, as Judge Aspen had ruled, it was not clear from the face of the CBA that the written agreement was intended to be a complete integration of all promises, both prior and contemporaneous; therefore the agreement did not on its face rule out the possibility that the parties intended the agreement to be conditioned by a reopener agreement. *Merk v. Jewel Food*

Stores, 702 F Supp 1391, 1401 (ND Ill 1988). So, if the jury had found that the written agreement was intended to be the parties' full agreement, then even if it believed that there was an oral reopener, that oral agreement could not be used to modify the written agreement. *Mohr v. Metro East Mfg*, 711 F2d 69, 72 (7th Cir 1983). Had the jury found that the written agreement was intended to be the full agreement between the parties, then the plaintiffs would have won -- and so the jury was told.

But the jury found that the written agreement was *not* intended to be the full expression of the agreement between the parties, and the evidence supports this finding. The plaintiffs' own witnesses negated the possibility that the written agreement was the only agreement. Burki testified that he agreed to "sit and discuss" in exchange for Jewel dropping the most favored nations clause, and that he intended that agreement to be honored by the Union even though the agreement was not incorporated into the CBA. The defendant offered evidence of other agreements, reached at the time the written CBA was concluded, that the parties intended to be honored but that were not included in the written agreement. These facts alone would have permitted a jury to conclude that the parties did not intend the written agreement to be their complete agreement in the absence of clear language to the contrary.

Perhaps a jury could have concluded that these other agreements were not intended to be part of the collective bargaining agreement, but were rather, as Merk argues, collateral agreements. Certainly if the agreement were a reopener agreement, it had to be intended to be part of the collective bargaining agreement to be effective; perhaps if it were merely an agreement to sit and discuss it did not. But given that the language of the contract did not manifest an intent to integrate, these were questions of intent that the jury was free to decide either way. Any objection that the jury was not properly instructed on this point was in any event waived, for Merk never tendered an instruction that distinguished between collective bargaining agreements and other agreements.

Merk argues that Jewel had the burden of demonstrating that the apparently integrated written agreement was not integrated. As Merk claims, "elementary princip[les] of contract law embodied in the Restatement (Second) of Contracts section 209 establish that where a contract is reduced to writing, that writing is presumed to be an integration of the agreement of the parties *unless evidence of extrinsic agreements is introduced.*" (emphasis added). But here such evidence was abundant, not the least being the testimony of Petronella and Collins that Burki agreed to a reopener that had to remain outside the contract. The jury explicitly found that there was such an agreement, and the very essence of that agreement implied that the written agreement was not complete. Whatever burden Jewel had to bear, the evidence permitted a finding that the contract was not integrated.

More fundamentally, however, Merk argues that it is "against national labor policy" to recognize an oral reopener agreement conditioning the rights of employees under a collective bargaining agreement. As I have discussed in the published opinion issued today, however, there is no national labor policy mandating that a collective bargaining agreement be in writing to be valid.

Merk's second argument for JNOV is that as a matter of law the evidence was insufficient to establish that the Union and Jewel had a practice of ignoring Union requirements of ratification.

As the defendant points out, there is no legal requirement that collective bargaining agreements be ratified by union members. *Chrysler Workers v. Chrysler*, 834 F2d 573, 582 (6th Cir 1987); *Confederated Independent v. Rockwell-Standard Co*, 465 F2d 1137, 1140 (3d Cir 1972); *Cleveland Orchestra Comm v. Cleveland Fed of Musicians*, 303 F2d 229, 233 (6th Cir 1962). Any ratification requirement must come from the union constitution or bylaws. In this case, the Union rules required ratification of the collective bargaining agreement. The question for the jury was

whether this requirement included a requirement that the reopener had to be ratified as well.

The jury found that the agreement did not have to be ratified in order to be valid. There was some evidence that Jewel did not have notice of the requirement of ratification and that notice was required, *Texaco, Inc v. NLRB*, 722 F2d 1226, 1236 (5th Cir 1984); even if Jewel had notice, there was evidence of a number of agreements that were at least arguably within the scope of the collective bargaining agreement but that were not individually ratified yet were understood by both sides to be binding parts of the parties' agreement, thus establishing a practice of ignoring the ratification requirement, *Central States Pension Fund v. Kraftco, Inc*, 799 F2d 1098, 1112 (6th Cir 1986); finally, there was sufficient evidence to support Jewel's reliance on Burki's and the committee's apparent authority to bind the union to reopen the contract as he represented they could.

Merk argues that the examples relied upon by Jewel as examples of commitments made without ratification are "too trivial" to support the general conclusion that there was a practice of ignoring the ratification requirement. The evidence would not have supported the conclusion that the union had no duty to submit any part of the collective bargaining agreement to the members for ratification, but that alone does not make plaintiffs' case. Merk's argument from triviality is contradicted by the evidence of a reopener agreed to in 1969. That agreement was premised upon a raid, not by Cub Food, but by the Teamsters, and allowed the contract to be reopened to renegotiate *higher* wages. If the jury concluded that there was an agreement to reopen the contract in 1969, as it could have, and that that agreement was not ratified, then the agreement in this case was no more significant to Jewel than the 1969 reopener was to the Union, and could be valid even if unratified.

Even if the evidence that there was no need to ratify were insufficient, which it is not, it is not clear that the burden I placed on the defendant to demonstrate a practice of ignoring the

ratification required was justified. The proper question in this context is not the general question -- whether an agreement must be ratified in order to be valid -- but whether Jewel had the right to rely on this agreement even if unratified. Regardless of the more general question, the answer to that question must clearly be yes. As the 6th Circuit has suggested, "absent clear notice that the Union was acting in bad faith against the interests of its members", the company has a right to rely on an agreement whether or not ratified. *Chrysler Workers*, *supra*, 834 F2d at 582. Here there was no evidence presented that Jewel had clear notice that agreeing to the reopener was acting in bad faith against the interests of Local 881's members. To the contrary, it appears that what motivated Burki to keep the reopener secret was tension with the International Union. In return for secrecy, Burki was able to buy an agreement with a company that appeared willing to take a strike. From the perspective of January 1983, Burki's behavior may well have been in the employee's best interest.

Plaintiffs' motion for new trial raises a number of grounds of error, but as the defendant has pointed out, the motion is incomplete. For it is not enough in a civil case merely to cite to an error in admitting or excluding evidence in order to secure a new trial. The movant must demonstrate that the error tainted the verdict in a significant way. FRCP 61. This the plaintiffs have not done. I will, nonetheless, address the grounds that plaintiffs raise.

Plaintiffs first complain of my excluding evidence of the settlement between Local 881 and Jewel in 1985. As I have already mentioned, in 1985, as the 1982-1985 collective bargaining agreement was expiring, and in the midst of litigation in two separate forums, *Merk v. Jewel Food Stores*, *supra*, 848 F2d at 762, Jewel and the Union settled the dispute between them, with Jewel paying some proportion of backpay to workers still in Jewel's employ. Plaintiffs argue that since all the claims in that dispute were not all the claims in this, the settlement is admissible.

Merk's argument would allow exclusion under Rule 408

only if the same case had been previously settled or offered to be settled. But the language of the rule is "claims", not "case", and a case may have many claims. Jewel's claim in this case is that there was a reopener, Merk's is that there was not. That claim or its denial was integral to both the suit to compel arbitration and the NLRB complaint, as evinced by plaintiffs' desire to introduce evidence of the settlement agreement to show that there was no such reopener -- the argument presumably being that the fact Jewel settled makes more likely the fact that there was no agreement. That evidence is inadmissible under Rule 408.

Moreover, it is clear that the purpose of the rule -- to facilitate settlement -- is advanced by its application in this case. Whatever the truth of that January 23, 1983 meeting, it is clear that by 1985 both the Union and Jewel were under pressure to negotiate a new contract. Rule 408 allows a potential litigant to settle its disputes without fear that such a settlement will be used as an admission. It is clear that the plaintiffs intended to use the settlement as such an admission and it was properly excluded.

Finally, even if the evidence was not properly excluded under Rule 408, it should be excluded under Rule 403. In the context of the renegotiations of a labor contract, the probative value of the fact of settlement is slim. Weighed against it is the clearly prejudicial effect such settlement would have had on a jury unschooled in the realities of labor negotiations. It is not true that Jewel Food Stores would necessarily be rational by standing on its claim that there was a reopener agreement even if true rather than settle a dispute with its Union. Without entering into a wide range of inquiries about the nature of the settlement negotiations and the economic conditions faced by Jewel in 1985, a jury is likely to misunderstand the significance of this settlement. The evidence would therefore be excluded under Rule 403.

Merk's second ground of error presents a more interesting question. Sometime after Jewel notified Local 881 that it was reopening the contract pursuant to the reopener agreement, the International representative, Peter Voeller, became involved in

the negotiations. The Local claimed that he was there as "an advisor", but while advising, Voeller sent reports back to the International summarizing his activities and the status of the Locals he represented. In one of these letters to the International, Voeller reported that "apparently an 'agreement' for a reopener was reached ... during the last contract negotiations." Even though this litigation had been pending for five years, and the document in which the statement was made the subject of discovery during those five years, it was not until two months before the start of trial that Jewel discovered the document in the International's files.

Merk stipulated to the document's authenticity; the only question is whether the document should have been excluded on grounds of hearsay. The document reported Voeller's interpretation of statements made to him in the course of his meetings with Union officials, and Merk argues it should have been excluded because it was hearsay, and it contained multiple levels of hearsay. FRE 805. Jewel argues that Rule 801(d)(2)(D) excludes these letters from the definition of hearsay, since they were made by a party's agent and were within the scope of his agency relationship. In the alternative, even if the letters are hearsay, Jewel argues that they are admissible under the catchall Rule 803(24).

The first question then is whether Voeller was the plaintiffs' agent. It is clear that a Local 881 official would have been, since at the time this statement was made, the only plaintiffs who could be plaintiffs were union members, and the officials of a union are clearly agents of the members for purposes of Rule 801(d)(2)(D). Merk argues that Voeller, however, is too tenuously related to the Local to be considered the agent of the union members, and in support, cites a number of authorities that criticize rule 801(d)(2)(D) in general. But whether or not a good rule, Rule 801(d)(2)(D) is the law. The rule makes no distinction for kinds of agents, and does not discriminate based on tenuousness. As the First Circuit has noted, the rule allows admissions by the lowest on the corporate hierarchy as much as

by the highest. *Union Mut Life Ins v. Chrysler Corp*, 793 F2d 1, 8 (1st Cir 1986). The only question then is whether Voeller should be considered part of the Union's hierarchy, and here, given that the Union officials testified that he was there to "advise" Local 881, the answer must be yes. Voeller was within the Union hierarchy, and was therefore an agent of the Union members. His statements are not hearsay.

Merk argues, however, that the document contains multiple layers of hearsay, each of which must be admissible before the document itself it admissible. FRE 805. To this there are two responses. First, even if there is a question whether Voeller is properly considered an agent, the statements he purported to relay to the International are statements by Local 881 employees, and thus clearly within Rule 801(d)(2)(D). Second, the document does not purport to represent what others had said. Instead, the document summarized what Voeller had learned in meetings with local officials, though obviously from the statements of others. They are his interpretations of those meetings. Where the statements are based on such interpretations, the question is controlled by *MCI Communications v. AT&T*, 708 F2d 1081 (7th Cir 1983). In *MCI*, the Seventh Circuit held that the fact a report made by agents was "based on hearsay or reflects opinion goes to its weight and credibility, not its admissibility." *MCI*, *supra*, 708 F2d at 1143. The Voeller letter was properly admitted.

Because I believe that the document was admissible under 801(d)(2)(D), I do not reach the question whether it was also admissible under 803(24). Jewel cites persuasive authority supporting the proposition that where the documents "carry with them an aura of credibility" and where there could not be "a motive that the author would have to fill [the document] with untruth" the document should be admitted under Rule 803(24). *Attorney General v. Irish People*, 595 F Supp 114, 120 (DDC 1984). Rule 803(24) permits the admission of "a statement not specifically covered by any of the [other] exceptions but having equivalent circumstantial guarantees of trustworthiness" if the

court determines that "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served." It is clear here that each of these conditions is met, and were this all the Rule required, there would be little doubt of the letter's admissibility. The Rule requires more, however: that the party seeking to admit the document "make[] it known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, *including the name and address of the declarant*." (Emphasis added.) The whereabouts of the declarant here, Peter Voeller, were unknown. The plaintiffs represented to me that efforts to locate him were unsuccessful. But Rule 803(24) disallows admission of the letter "unless" the condition I have just stated is fulfilled, and here it was not. No doubt, Jewel is not responsible for not knowing the location of Voeller. But in light of the requirement for "name and address" and the absence of an excusing defense of reasonable effort offered by the party seeking the admission of the hearsay document, I am not confident that justifiable ignorance is sufficient.

Merk's next two objections can be considered together, since both are resolved on the same ground. In two pretrial rulings, I limited the defendant's ability to introduce evidence of the existence of a 1969 reopener, and the facts surrounding the resignation of Fred Burki. The only evidence that the defendant intended to offer relating to the 1969 reopener was the testimony of Petronella. Petronella was not involved in the 1969 negotiations, but believed that there was a reopener in the 1969 contract, and the defendant sought only to admit that evidence to show Petronella's state of mind when negotiating the 1982 contract. Plaintiffs objected, and I permitted the defendant to introduce the evidence only for that limited purpose. The second objection concerns evidence relating to Burki's resignation from

the Presidency of Local 881. Plaintiffs objected to such evidence on grounds of prejudice. It appeared that Burki had established a retirement annuity without informing his executive committee, and that while his behavior was perfectly legal, the committee's anger at not being informed lead to Burki's early and quick retirement. Jewel wanted to introduce the evidence to show a pattern of secret dealings by Burki, supporting the conclusion that Burki would have made a secret deal to reopen the contract. Before trial I excluded the evidence on the ground of prejudice, but made my ruling tentative upon the evidence adduced at trial.

Thus, in both cases the evidence Merk now complains of had been limited or excluded before trial. But in both cases, the plaintiffs' own witnesses drew the matters into question. Burki claimed on direct examination that there had never been another oral reopener agreement, but on cross had to admit that there was in fact a reopener in 1969. Once he had made his representation on direct, I could not reasonably have forbidden the defendant to show that it was false. Similarly with the retirement issue. Burki claimed, contrary to fact, that the circumstances surrounding his resignation were perfectly ordinary – that it was motivated solely by the "promotion" he had received to a post in the International. Once he had made this claim, again, I could not reasonably bar the defendant from crossing him on that question, and note that the cross was limited to the parameters I had set before trial.

As I have suggested, this whole case turned on credibility. At issue was the credibility of the Union representatives versus the credibility of Jewel. The evidence relating to the resignation and to the 1969 reopener went to the heart of Burki's credibility, and was invited by Burki's and Powell's own testimony. However unfavorable it was to the plaintiffs' case, I would not have been justified in excluding it from cross examination. If there was a 1969 reopener and Burki knew of it, then he was not entitled to deny its existence merely because I had ruled that Petronella could not claim he knew a reopener existed in 1969. Similarly, Burki was not free to rewrite the facts surrounding his resignation merely because I had ruled that Jewel could not create the

impression that the annuity was improper. All that Jewel demonstrated by both lines of cross examination was that Burki was not being as forthright as plaintiffs wanted the jury to believe.

Merk next argues that evidence of the 1984 negotiations was improperly admitted, standing on their objection made at trial and adding further argument in support of that objection here. This latter argument may be waived as Jewel argues, but I will address it nonetheless.

The evidence at trial suggested that for some time after Jewel notified Local 881 of its intention to reopen the contract pursuant to the reopener negotiated in 1982, Local 881 proceeded as if it was beginning the process of negotiations, without questioning the existence of the reopener. Then following the entry of the International via Voeller, Local 881 changed its position, and began to deny that there ever was any reopener agreed to by the parties. I admitted evidence of these negotiations because it is clearly probative of the question whether an agreement to reopen the contract was reached in 1982. The behavior of Local 881 when served with notice that the contract was to be reopened made more likely the possibility that there was a reopener, for if there was no reopener agreed to in 1983, then it is likely that Local 881 would have squawked; the eventual change in position by the Union was made more understandable once evidence of Voeller's participation was introduced, and once made understandable, made Jewel's story all the more believable. Both aspects were clearly relevant to the question whether a reopener had been agreed to, and for that reason properly admitted.

Merk now argues that the evidence should have been excluded because the word "reopener" did not have a clear meaning to all involved. Hence the plaintiffs were prejudiced, they now claim, by the confusion caused by this ambiguity. If, as Merk claims, reopener did not have a clear meaning, then the fact that "reopener" was used would not indicate that all understood that a "reopener" meant the parties would begin negotiations

anew.

"Reopener" has a meaning in labor law that has recently been made clear by the NLRB. *Speedrack, Inc*, 293 NLRB No. 128 (1989). Merk argues that this meaning was not clear in 1983, and for my purposes, I can assume it was not. Even if it was not, this is not grounds for a new trial. Had the union officials claimed that the a reopener was agreed to but that they did not know what the word meant, then Merk's argument might have merit. But the evidence at trial destroys this possibility. Burki testified unequivocally that he knew what reopener meant, and that he did not agree to a reopener. Powell testified that at first he was "naive" but then came to understand it to mean what Burki had explained that it meant. Thus, there is insufficient evidence to warrant a new trial based on any confusion in the use of "reopener".

Perhaps Powell was confused when Jewel informed him of its intent to reopen the contract. He did testify that at first he was naive, and perhaps the truth was that at first he did not understand the significance of the company's demand to reopen the contract, but after Voeller appeared, he did. Certainly the jury could have so concluded, and certainly Merk was entitled to argue this. But Merk did not so argue the case, and Powell did not so testify, and neither failure entitles Merk to a new trial.

Next Merk argues that it should have been able to introduce evidence demonstrating the actual effect of Jewel's wage cut on its profitability. I excluded this evidence because I concluded that it was irrelevant to the only question in the case, whether an agreement to reopen had been reached. Nothing Merk has offered here weakens that conclusion.

Without objection from plaintiffs, the defendant introduced evidence about the reasons why it believed, in 1982, that it was necessary to cut wages upon the entry of Cub Foods into the Chicago market. This was evidence of motive, and if believed, tended to make more likely the proposition that Jewel

needed a concession in the 1982 negotiations, and that a reopener was that concession. Merk complains that it was not permitted to introduce evidence about the actual effect of Cub Foods on Jewel's profitability. But unlike the evidence of the parties' behavior during the 1984 negotiations, this post-agreement evidence does not in any way affect the likelihood that an agreement was reached in 1983. Jewel could have been wrong about the effect that Cub Foods would have, or the wage cuts could have been just what the market demanded, or any number of other reasons could have explained the actual financial results enjoyed by Jewel after the wage cut was put into place. Nothing about that financial result could have made more or less likely the fact that an agreement had been reached.

Moreover, even if relevant, the evidence would have to be excluded on grounds of prejudice and delay. FRE 403. Plaintiffs wanted to introduce evidence of the total wage savings enjoyed by Jewel – some $80 million. Alone that figure is highly misleading, for the wage cuts were balanced with price cuts as well. Had the evidence been introduced, the defendant then would be entitled to introduce evidence to rebut the inflated $80 million figure, in the form perhaps of expert testimony about the actual effect on demand that the price cuts had, and the overall effect on profitability. Such testimony would have taken the jury far afield of the only question at issue in the trial – namely whether there was an oral reopener agreed to by the parties. The evidence was therefore properly excluded, either under Rule 402 or 403.

Finally, Merk objects to the instructions: that one instruction was not given, and that certain instructions were. The instruction not given, instruction #9, was Merk's "meeting of the minds" instruction, an instruction generally outlining contract law, ostensibly for the jury's education. I am not sure that there is any case in which the instruction would be helpful, for it is not the average or reasonable juror who would find the directive that "A binding contract requires a meeting of the minds of the contracting parties" actually helped him resolve any material dispute.

Besides this general skepticism, the instruction was clearly not called for in this case. Plaintiffs could have argued that there was an agreement about a reopener between the Local 881 and Jewel, but that Local 881 did not understand "reopener" to mean what Jewel meant "reopener" to mean. Had that been the evidence, then something like the instruction proffered would be appropriate. But that was not the evidence in the case. As Jewel argues, plaintiffs are "stuck with Burki's and Powell's denials that 'reopener' was even mentioned by Petronella or Collins on January 27, 1983." Given the denial that a reopener was agreed to at all, there was no evidence to support a verdict resting upon the conclusion that a reopener was agreed to but its meaning is what plaintiffs now want it to mean.

The jury here found Burki's and Powell's testimony not credible; it concluded that there was a reopener agreement entered into between the parties on January 27, 1983. The only evidence presented that supported that conclusion was the evidence of the defendant, and that evidence was that the agreement was for an "economic reopener with full reservation of rights." There was no evidence presented that Burki and Powell understood that agreement to mean something other than what it is understood now to mean, for again, Burki and Powell denied that there was such an agreement. No "meeting of the minds" instruction was therefore necessary.

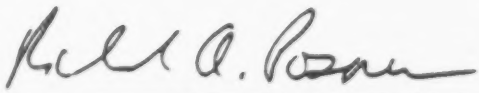
The other objections to the instructions track the arguments made by the plaintiffs in their motion for judgment notwithstanding the verdict. Because I do not believe that their arguments on the law in that motion were correct, I will not address again the same arguments in this context. I will however note one argument by plaintiffs not addressed before.

Merk argues that a new trial is merited because the order of issues presented in the substantive instructions differed from the order of the special interrogatory, thus confusing the jury and tainting the verdict. This argument is baseless, and its inclusion

here does not help plaintiffs' case. The verdict was consistent both internally and with the evidence. It is true that the jury was instructed that it must determine whether (1) there was an integration, and if it determined that there was not an integration, (2) whether there was a ratification requirement, and if not a ratification requirement, (3) whether there was a reopener, while the verdict form asked the jury to determine (1) then (3) then (2). An "inconsistency" in the order of explication does not demonstrate an error sufficient to taint the verdict of this jury. There is no suggestion made by the plaintiffs why resolving one question before the other would in anyway be misleading to the jury in its determination. Merk's objection here is absolutely without basis.

Plaintiffs' motions are denied. The judgment for the defendant in accordance with the verdict will be entered forthwith.

Finally, in response to a number of arguments made by both parties, I ordered each side to show cause why it should not be sanctioned pursuant to Rule 11. Having reviewed the submissions by each, I have decided that, however tenuous, both parties had an adequate basis in fact and law for the arguments made, save two unintentional errors by the plaintiffs. Rule 11 sanctions are not appropriate.



Richard A Posner, Circuit Judge
(Sitting by designation)

Date: April 9, 1990

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

Kelly Merk, et al

v.

Jewel Food Stores, Division of Jewel Companies, Inc.

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
85 C 7876/85 C 10362

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of defendants, Jewel Food Stores Division of Jewel Companies, Inc., etal and against the plaintiffs, Kelly Merk, etal, in accordance with the verdict of the jury.

April 9, 1990
Date

H. STUART CUNNINGHAM
Clerk

/s/ GLADYS LUGO
Gladys Lugo
(By) Deputy Clerk

APPENDIX E

United States District Court
Northern District of Illinois
Eastern Division

Kelly Merk, *et al.*,

Plaintiffs,

v.

No. 85 C 7876

Jewel Food Stores,
Division of Jewel Companies, Inc.,

Defendant.

OPINION

April 9, 1990

POSNER, *Circuit Judge* (sitting by designation). This is a class action by employees of Jewel Food Stores, the grocery chain, against the chain, charging that it reduced their wages below the level fixed in the collective bargaining agreement between the company and the union representing the employees. Jewel contends that at the same time it signed the collective bargaining agreement it made an oral side-agreement with the union, a "reopener" agreement which provided that upon a designated contingency coming to pass (namely the entry of particular competitor into Jewel's market) the "economic" provisions of the agreement (e.g., wages and hours) would be repealed. The plaintiffs deny that any such agreement was made and further argue that if it was made, still it was invalid for a variety of reasons. The suit is under section 301 of the Taft-Hartley Act, 29 U.S.C. § 185.

Before the trial, I granted partial summary judgment on three issues, that, because of their novelty, merit discussion in a published opinion; but I issued no opinion at that time. The trial resulted in a jury verdict for Jewel, and Merk's post-trial motions raise a fourth issue that merits such discussion. The other issues raised by Merk's motions I have resolved in an unpublished order,

issued today, in which I direct the entry of judgment for Jewel in accordance with the jury's verdict.

1. The suit is on behalf of all Jewel employees who received the lower wage that the company set in purported reliance on the oral reopener. Originally I ruled that employees who were hired *after* the lower wage was in place have no cause of action and therefore are not entitled to any of the damages that the plaintiffs have sought even though they are part of the class. I based this ruling on the absence of any evidence that these employees signed on with Jewel in the expectation that they would receive a retroactive raise because the collective bargaining agreement had been violated. This is true but (as both sides now agree) irrelevant. These employees are third-party beneficiaries of the agreement, and they are entitled to its benefits unless there was a valid oral reopener cutting down on those benefits as they appear in the written agreement.

2. The complaint seeks punitive damages for what the plaintiffs describe as Jewel's "outrageous" conduct in fabricating an oral reopener. I agree with Jewel, and with the majority of courts that have addressed the question, Annot., *Award of Punitive Damages Under § 301 of Labor Management Relations Act*, 71 A.L.R. Fed. 221 (1985), that punitive damages are not available in a section 301 suit. The Supreme Court has so held with regard to union defendants sued for breach of their duty of fair representation, *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), and it would be unreasonable to distinguish between union and employer defendants in this regard, or between suits for breach of contract and suits for breach of the duty of fair representation:

a. When the Taft-Hartley Act was passed in 1947, punitive damages for breach of contract were virtually, perhaps completely, unknown. Section 301 of the Act does not create a complete remedial scheme. Essentially it just makes collective bargaining agreements actionable, and leaves the incidents of the 301 suit—statute of limitations, other defenses, third-party beneficiaries, parol evidence rule, and all the rest, including remedy—to be worked out by the courts in the exercise of their ill-defined but adequate power to make federal common law. In interpreting other statutes that create a federal right without specifying the

details of remedy and procedure, notably 42 U.S.C. § 1983, a statute first passed in 1871, the Supreme Court has looked to the common law at the time of enactment. *Smith v. Wade*, 461 U.S. 30 (1983). If that approach is taken here, it becomes evident that punitive damages are unavailable in section 301 suits.

b. Punitive damages are of course far more common in tort cases than in contract cases. Breach of the duty of fair representation is a form of breach of fiduciary duty, and is therefore a tort. Since punitive damages are not available for breach of the duty of fair representation (*Foust*), they surely are not available for a simple breach of contract.

c. Partly in explanation of *Foust*, partly related to the point just made, federal policy aims to promote harmonious labor relations; this is one of the justifications for the mildness of the National Labor Relations Board's remedial powers. 442 U.S. at 52; *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940). That aim would be deflected if punitive damages were available in section 301 suits. The possibility on the one side of recovering and on the other side of having to pay potentially astronomical damages would place a cloud over labor negotiations, engendering formality and suspicion inimical to the harmonious resolution of labor disputes.

All three reasons I have just given are independent of whether the defendant is a union or an employer. I am convinced therefore that the Supreme Court would not allow punitive damages to be awarded against employers for violating collective bargaining agreements. At the very least, it would not allow the award of punitive damages in a case such as the present, a case at worst of *simple* breach of contract (this much the jury's verdict for Jewel makes clear), uncomplicated by evidence of fraud or other tortious misconduct. For even outside the labor field, punitive damages are not awarded for simple breaches of contract. *Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 750-51 (7th Cir. 1988).

3. The next question is the force to be ascribed to an oral reopener agreement. To Jewel, it means that the pertinent provisions of the contract were repealed when the reopening occurred, and therefore the employees have no further remedy

under the contract. Jewel concedes that the abrogation of the contract does not dissolve the parties' duty to bargain collectively in good faith. It merely puts the parties back to square one—that is, to the situation before there was a collective bargaining agreement—with respect to the provisions covered by the reopener. That state is not quite Hobbes's state of nature. The parties are obligated to bargain in good faith, and only when, having done so, they find themselves at loggerheads ("impasse" in the jargon), are they free to resort to their economic weapons—the strike, the lock-out, the (as here) unilateral reduction in wages. But the obligation to bargain in good faith is imposed by section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), not by contract, and so it cannot be enforced by a suit under section 301 of the Taft-Hartley Act.

The plaintiffs concede that "reopener" is a term of art in the labor lexicon and that in its recent decisions the Labor Board has defined reopener just as Jewel does—as meaning repeal of the provisions of the collective bargaining agreement that are subject to the reopener. *Speedract, Inc.*, 293 N.L.R.B. No. 128, at pp. 3-7 (1989). But they say that if Jewel and the union agreed to a reopener, they were not using the term as one of art. They meant not to repeal the relevant provisions of the contract but simply to suspend their operation *provided* that Jewel bargained in good faith and reduced wages only when, having bargained in good faith, the parties reached an impasse. And they say the condition was not fulfilled—Jewel didn't bargain in good faith but instead implemented a fixed pre-existing plan to reduce wages—and therefore that the terms of the reopener were not fully honored. So the reopener was never activated.

When persons in a trade or business or other activity put into a contract (oral or written) a term that is a term of art within the particular trade or business or activity—that has, in other words, a well understood meaning in the particular community in which the contract was made—the parties can be presumed to have used the term with that meaning. Cf. White & Summers, Handbook of the Law Under the Uniform Commercial Code 100 (2d ed. 1980). The plaintiffs have presented no contrary evidence. The union had its remedies under the National Labor Relations Act against Jewel's bargaining in bad faith. There is no indication it negotiated for a contractual remedy as well.

4. The previous point assumed the propriety of oral reopeners, but the plaintiffs also argue that an oral reopener that limits rights conferred by a collective bargaining agreement is against federal labor policy. They rely on cases that appear to disallow oral modifications of such agreements, especially where the modification is of a pension or welfare trust established by the agreement, or of a provision relating to governance. *Central States, Southeast & Southwest Areas Pension Fund v. Behnke*, 883 F.2d 454, 459-60 (6th Cir. 1989); *NLRB v. Westinghouse Broadcasting & Cable, Inc.*, 849 F.2d 15, 19 (1st Cir. 1988); *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981). Yet it is a settled principle, firmly bottomed on section 8(d) of the National Labor Relations Act, that the collective bargaining agreement itself need not be in writing unless one of the parties requests that it be. 29 U.S.C. § 158(d); *Gariup v. Brichler Ceiling & Interior Co.*, 777 F.2d 370, 373-74 (7th Cir. 1985); *Central States, Southeast & Southwest Areas Pension Fund v. Behnke supra*, 883 F.2d at 459; *Eastern Washington Distributing Co.*, 216 N.L.R.B. 1149, 1151 (1975). How to weave together the two threads? The answer is hinted at in *Price v. International Brotherhood of Teamsters*, 457 F.2d 605, 609 (3d Cir. 1972), a case paradoxically relied on by the plaintiffs in this case. Statutes like Landrum-Griffin and ERISA impose obligations in the *administration* of collective bargaining contracts; oral modifications, unknown to the union rank and file, can upset entitlements created by the contracts and enforced in administering them. But these statutes do not seek to interfere with the negotiation of the agreement—the domain of the National Labor Relations Act, section 8(d) of which is a considered decision to allow oral agreements when both parties prefer them. *Hamilton Foundry & Machine Co. v. International Moulders & Foundry Workers Union*, 193 F.2d 209, 214 (6th Cir. 1952). If oral agreements are permissible with both parties' consent, and they are, then an agreement part written and part oral should also be permissible, and that is what we have here. The oral reopener was adopted in the midst of contract negotiations; the negotiations were concluded and the contract was signed after the oral reopener agreement was made. It did not modify the contract; it was part of the contract. It was not against federal labor policy.

APPENDIX F

F-1

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate Marvin E Aspen

Sitting Judge/Mag. If Other Than Assigned Judge/Mag. Richard A Posner

Case Number: 85 C 7876

Date: 1/25/90

Case Title: MERK v. Jewel Food Stores

* * *

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(2) [X] [Other docket entry:]

Entering Memorandum Opinion and Order on Eleven pretrial motions in anticipation of trial, 1/29/90.

/s/ RICHARD A. POSNER

* * *

(12) [X] (For further detail see

[X] order attached to the original minute order form.)

[X] Docketing to mail notices.

courtroom deputy's initials GI

United States District Court
Northern District of Illinois
Eastern Division

KELLY MERK, et al.,

Plaintiffs,

v.

JEWEL FOOD STORES,
DIVISION OF JEWEL COMPANIES, INC.,

Defendants.

No. 85 C 7876

Memorandum and Order

This order disposes of eleven motions made in anticipation of trial, and resolves the two remaining questions of damages.

1. Jewel's Motion for Summary Judgment as to Count V

I have reviewed Jewel's motion for Summary Judgment as to Count V, and Merk's response, and will GRANT that motion dismissing Count V. The issue of punitive damages in Section 301 cases is an important one, and I will address the question in depth in a written opinion to be released.

2. Jewel's Motion to Bifurcate Issues for Trial

In light of my ruling on Jewel's motion for summary judgment, and my rulings on the two damages issues in point 11 below, Jewel's motion to bifurcate the trial is moot. The trial

commencing on Monday, January 29, 1990 will focus exclusively on the question of liability. If MERK prevails on liability, I will enter judgment according to the stipulated damages entered December 19, 1989, subject to the rulings on damages below.

3. JEWEL'S MOTION TO EXCLUDE ANY EVIDENCE OF EVENTS OCCURRING AFTER FEBRUARY 15, 1984; MERK'S MOTION TO EXCLUDE ANY EVIDENCE OF MEETINGS BETWEEN THE UNION AND JEWEL SUBSEQUENT TO OCTOBER, 1983.

My ruling on summary judgment reduces the issues for trial to these: whether there was an oral reopener, and if there was, the scope and effect of that reopener. Both of these motions concern the scope of testimony relevant to these issues.

The parties may introduce any evidence tending to make more or less probable the existence of a reopener. Such evidence may include evidence of events occurring after the alleged reopener was concluded so long as those events make more or less probable the existence of a reopener. JEWEL claims that it made explicit reference to the oral reopener when asking the Union to renegotiate the collective bargaining agreement, and that the Union did not contradict that representation before commencing mid-term negotiations. If believed, that is evidence of conduct consistent with the existence of a reopener, and is admissible to establish its existence. *See Hellenic Lines Limited v. Gulf Oil Co*, 340 F2d 398, 401 (2d Cir 1965); *Apex Oil Co v. Vanguard Oil & Service Co*, 760 F2d 417, 422 (2d Cir 1985); *Moridge Mfg v. Butler*, 451 NE2d 677, 680 (Ind App 3 Dist 1983). While it is true as MERK points out that silence in the face of an offer will not ordinarily be construed as an acceptance, *Acme Markets v. International Ass'n*, 506 F Supp 92, 99 (ED Pa 1980), the silence relied upon by JEWEL is not offered as evidence of the Union's *acceptance* of the oral reopener, but instead of its *existence*.

MERK relies upon a footnote in an earlier opinion by Judge Aspen in this case to support its argument that this evidence should be excluded. There Judge Aspen wrote:

> "Jewel also contends that the Local's participation in negotiations after Cub Foods entered the market and Jewel unilaterally reduced wages and benefits is itself evidence that the Local ratified the alleged reopener agreement or entered into one later. We reject this position. That the Local sought negotiations rather than a lawsuit is consistent with the federal labor policy to encourage the extrajudicial resolution of disputes rather than a reflexive rush to the courts. The Local did not accept a modification to the collective bargaining agreement merely by discussing it."

Merk v. Jewel Food Stores, 702 F Supp 1391, 1401 n.10 (ND Ill 1988).

Certainly the mere fact that the Union entered mid-term negotiations does not establish that there was an agreement executed at the same time as the collective bargaining agreement to enter such mid-term negotiations. Nor does the fact that the Union entered negotiations entail that it accepted a modification of the agreement, or that it accepted at that time an agreement to reopen the contract. The evidence JEWEL intends to offer does not make any of these leaps. While evidence that the Union entered mid-term negotiations does not show that there was a reopener, evidence that the Union did not object to JEWEL's assertion that there was a reopener certainly suggests that a reopener had been agreed to. JEWEL's evidence makes the existence of the reopener more likely, and evidence does not have to be conclusive to be admissible.

Therefore, I will DENY MERK's motion to exclude all

evidence of meetings with the Union and JEWEL after October, 1983.

JEWEL's motion raises a distinct issue. None dispute that in February, 1984, JEWEL unilaterally reduced the wages of its employees. At that point, a dispute between the Union and JEWEL erupted, and JEWEL argues that the events after February are inadmissible by reason of FRE 408.

Rule 408 is not a broad ban on all evidence of events following the birth of a dispute between two parties. By its own terms, the "rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The rule permits evidence of offers to compromise or of conduct or statements made in compromise negotiations when "the evidence is offered for another purpose, such as proving bias or prejudice." Therefore, to the extent JEWEL's motion seeks simply to ban all evidence after the beginning of this dispute, it seeks too much, but to the extent it seeks to exclude evidence already excluded by Rule 408 it is unnecessary.

Nonetheless, I will GRANT JEWEL's motion to the extent that it is understood as covering only that evidence encompassed within the scope of Rule 408. Evidence otherwise admissible because tending to establish the existence or nonexistence of a reopener will be excluded where that evidence derives from offers to compromise the claim, or compromise negotiations, within the scope of Rule 408.

4. JEWEL'S MOTION TO EXCLUDE EVIDENCE OF OUTSTANDING CLAIMS ENTERED INTO BY DEFENDANT AND UNION IN JUNE 1985

The resolution of this motion follows directly from the discussion above. For purposes of liability, Rule 408 excludes evidence of the settlement reached by JEWEL with the Union, since the claims there settled were the identical claims pressed by these

plaintiffs. JEWEL's motion is GRANTED.

MERK's concern that the jury will be confused can be addressed without introducing evidence of the settlement. The parties are invited to draft a stipulation or instruction for the start of trial which would allay the concerns MERK expresses.

5. JEWEL MOTION TO EXCLUDE EVIDENCE OF THE RATIFICATION OR LACK THEREOF OF THE REOPENER

Late in this litigation, MERK has raised ratification as a bar to JEWEL's reopener defense. MERK claims that even if there was a reopener agreement, it is invalid since not ratified. JEWEL seeks to exclude such evidence on a number of grounds, including the claim that if the failure to ratify the reopener makes the reopener invalid, it likewise makes the whole collective bargaining agreement invaiid. JEWEL provides no authority for its novel claim, and it cannot be correct that an entire collective bargaining agreement would be invalid because one part was not ratified. A Union cannot pick and choose which parts of the collective bargaining agreement it wants to enforce by submitting selected sections to its members, but the remedy for this fault does not consist of abandoning the agreement completely.

The question is immaterial to this motion in any case. JEWEL's motion is a motion *in limine*; it seeks to exclude evidence. Whether or not an unratified oral reopener is enforceable, the existence of a ratification requirement is probative of the existence of a reopener. If ratification is required, and no ratification was pursued, that makes it less probable that there was a reopener at all.

If JEWEL had demonstrated that in no context would the existence of a ratification requirement affect the enforceability of any agreement not ratified, then it would have undermined the probative value of evidence about the ratification requirement. In its motion *in limine*, JEWEL provides no authority for such a conclusion; however, JEWEL's other pretrial submissions do add-

ress the question. The most that can be derived from the authority that JEWEL cites, however, is that if there is a practice of accepting unratified agreements notwithstanding a ratification requirement, then the failure to ratify will not be fatal to the agreement's enforceability. *Central States SE and SW v. Krafico, Inc*, 799 F2d 1098, 1112 (6th Cir 1986). But to establish the predicate of this test, JEWEL would have to introduce evidence of other agreements that were enforceable or enforced even though not ratified. If the ratification requirement would be relevant to establish the enforceability of those other unratified agreements, JEWEL cannot contend that it is irrelevant to the existence or effect of the reopener agreement at issue in this case.

JEWEL's motion is therefore DENIED.

6. JEWEL's MOTION TO EXCLUDE TESTIMONY OF NAMED PLAINTIFFS

As I have structured the trial, the only issue before the jury is the existence and effect of the alleged reopener agreement. Only evidence relevant to that question will be admitted. JEWEL has asked me to exclude the testimony of named plaintiffs, since they could offer no evidence relevant to the existence or effect of an oral reopener; JEWEL also argues that the plaintiffs are not representative members of the class since the damages they have suffered is disproportionately large. While this latter argument if true would stand in tension with the determination that these class members would be representative for purposes of class certification, since damages are no longer an issue in the trial, I will ignore that problem here.

The plaintiffs may of course testify just like any other witnesses if they have relevant evidence to offer. MERK argues that due process entitles them to more, an argument bordering on the sanctionable. Nothing MERK cites stands for the proposition that a plaintiff in a civil case has the right to testify even if he has no evidence to offer. Nor could MERK cite authority for such a position.

I am uncomfortable, however, with granting JEWEL's motion unconditionally, for plaintiffs could use these witnesses to establish the fact that JEWEL reduced their wages. Because damages have been stipulated, and because punitive damages are not at issue, the total amount lost by any plaintiff is not relevant. For the sake of clarity for the jury, however, it would be permissible to allow plaintiffs to establish the size of reduction relative to the wages established in the collective bargaining agreement. For example, named plaintiffs could testify that their wages were reduced from $X/hr to $Y/hr, but could not testify as to the total amount they thereby lost. I will not hesitate to limit cumulative testimony, so that the need to call more than one named plaintiff to establish these limited facts must be clearly established.

None of this testimony is of course necessary. The parties could just as easily stipulate to all the facts to which the named plaintiffs could testify. But in the absence of such a stipulation, I will not unconditionally bar the testimony of named plaintiffs. MERK may call them for the limited purpose I have outlined. If, however, the testimony exceeds these limits, upon objection by JEWEL, I will not hesitate to limit further testimony. I want strongly to avoid evidentiary battles before the jury, and urge both parties to keep that in mind when eliciting testimony outside the scope of relevancy.

7. MERK's MOTION TO EXCLUDE EVIDENCE OF FACTS CONCERNING FRED BURKI's RETIREMENT.

MERK asks me to exclude evidence of Fred Burki's involvement in alleged violations of Union rules relating to the purchase of an annuity for his pension. JEWEL responds that such evidence is relevant under Rule 404(b) to establish (1) a motive for Burki to avoid activities that would draw the attention of the Union's International; (2) knowledge of Jewel's chief negotiator of the Union's internal turmoil; (3) evidence of the relationship between Jewel's and the Union's negotiator; and (4) questions of Union reputation relevant to the punitive damages count, a ground made moot by my decision above. JEWEL also asserts that Burki can be

cross-examined with the evidence of past acts under Rule 608(b) if the acts are probative of his character for truthfulness. For the reasons that follow, I will conditionally GRANT MERK's motion, subject to reconsideration upon the presentation of a fuller foundation.

If (a) the annuity incident did give Burki a motive to avoid review by the Union's International, and (b) weakening the contract by incorporating a "most favored nations clause" or a reopener agreement would have invited International review, then evidence concerning the incident would be at least probative of motive. But these factual predicates must be established. The motion *in limine* and its response have not presented me with enough to determine precisely the link between the incident involving the annuity and the motive to conceal. If, however, JEWEL is able to demonstrate such a link within the motive exception to Rule 404(b), then I would reconsider my decision to exclude such evidence. I also don't think that the facts surrounding Burki's resignation are necessary to establish JEWEL's knowledge of Union turmoil, or to establish the strength of the relationship between Jewel's and the Union's negotiators.

If Burki does testify, then if the events surrounding his resignation bear on Burki's truthfulness, they would be relevant to cross-examination under Rule 608(b) "concerning the witness' character for truthfulness or untruthfulness." But as presented, neither party has given me enough to determine how such facts would bear on his truthfulness. If JEWEL wants to explicate the link more fully, it may do so and I would reconsider the question before Burki testified. But based on the information as submitted, I cannot determine whether the events actually relate to Burki's character for truthfulness.

8. MERK'S MOTION TO EXCLUDE EVIDENCE OF UNION REPRESENTATION OF PLAINTIFFS

MERK moves to exclude any evidence by JEWEL of the Union's representation of the plaintiffs during the negotiations

leading to the settlement between the Union and JEWEL. JEWEL claims that such evidence is relevant in the damages stage of the trial, to show that JEWEL reasonably relied upon the Union's apparent authority to represent the interests of the employees who had left JEWEL's employ. JEWEL concedes that the law of this case is that the Union had no duty to represent the employees; but argues that they nonetheless purported to represent the employees, and that that purported representation excuses JEWEL from liability.

I will GRANT MERK's motion. The trial as framed by JEWEL in its trial brief does not reach the common law agency issue. It is not, therefore, an issue that will be tried by this Court. Even if it had raised this as an issue for trial, the likelihood that former employees agreed that the Union would represent them in settlement negotiations following the wage cut is slight at best. JEWEL's reliance on dicta from the Seventh Circuit suggesting the possibility of this agency relationship is misplaced, and it has failed to present or preserve the issue for trial.

9. MERK's MOTION TO EXCLUDE EVIDENCE OF A PRIOR ORAL AGREEMENT

MERK has asked that no evidence of a prior oral agreement between Jewel and the Union be admitted; JEWEL has responded that it intends only to introduce evidence that (1) Petronella had participated in mid-term negotiations pursuant to what he understood was an oral reopener agreement; (2) those negotiations resulted in a change in the wage scale in 1970; (3) and Petronella was aware of those facts when he negotiated the agreement in 1983.

So long as the evidence is limited as indicated, I will DENY MERK's motion.

10. MERK's MOTION TO EXCLUDE ANY EVIDENCE SUGGESTING THE EXISTENCE OF AN ORAL REOPENER AGREEMENT

Finally, MERK asks me to exclude any evidence of the existence of an oral reopener agreement entered into at the time JEWEL and the Union signed the collective bargaining agreement in 1983. Granting such a motion would essentially obviate the need for any trial at all. But for the reasons that follow, I will DENY the motion.

MERK claims JEWEL should be barred from introducing evidence about the reopener since (1) the reopener was not pled as an affirmative defense; (2) the reopener did not give JEWEL a right unilaterally to implement changes if and when the renegotiations failed; (3) the agreement is unenforceable since not ratified; (4) the agreement is prohibited by Federal Labor policy.

(1) MERK's first argument is frivolous. If there was an agreement to reopen the contract upon the happening of certain events, and those events happened, then the actions pursuant to that reopener do not constitute a breach of the collective bargaining agreement. An affirmative defense is a "yes but" defense: "yes" there was a breach, "but" I should not be held liable. JEWEL's argument is that there was no breach, and is not an affirmative defense.

(2) MERK's second argument is little more than frivolous. As JEWEL points out, the scope of any reopener is an issue of interpretation; its uncertainty is not grounds for excluding evidence about a reopener.

(3) Next MERK argues that even if there was an agreement, it is unenforceable since unratified. This argument is potentially very strong, though not strong enough to foreclose the admission of evidence of a reopener agreement.

There is strong authority for the proposition that an employer who knows of a ratification require-

ment, and who knows that a provision has not been ratified, cannot rely upon an unratified agreement. *Texaco v. NLRB*, 722 F2d 1226, 1236 (5th Cir 1984). *Compare Deboles v. TWA*, 552 F2d 1005, 1018 (3d Cir 1977); *Meyerson v. Contracting Plumbers Ass'n*, 606 F Supp 282, 287 (SD NY 1985). However, if there is a practice or understanding that the Union's agent may bind the Union without ratification, despite the requirement of ratification in the Union constitution, then the agreement may still be enforced against the Union. *Central States Southeast and Southwest Areas Pension Fund v. Kraftco*, 799 F2d 1098, 1112 (6th Cir 1986); *NLRB v. Brother of Painters*, 334 F2d 729, 731 (7th Cir 1964). JEWEL claims that it will show that the practice of the Union was to ignore the ratification requirements, and that it did that for a number of agreements.

This JEWEL needs to show. For if there was a requirement of ratification known by JEWEL, unless there was also an understanding that agreements would be enforceable notwithstanding the requirement, the oral reopener would not be enforceable.

The proper handling of this question of ratification, however, is not to exclude evidence of an unratified reopener. Rather, it is to require that the jury make specific findings about the ratification process. The jury will be asked, therefore, whether there was a ratification requirement, and if there was, whether the Union and JEWEL had a practice of ignoring that requirement so that agreements outside the requirement were nevertheless enforceable. Obviously, MERK bears the burden on the first question; JEWEL on the second.

(4) Finally, MERK argues that an oral reopener is contrary to the policy of the NLRA, Section 8(d),

29 USC 158(d) and contrary to the parol evidence rule. This argument, like the others, must fail.

As JEWEL suggests, it is beyond dispute that nothing in the NLRA precludes a written reopener agreement. *NLRB v. Red Lion Oil Co*, 353 US 282 (1957). Oral reopener agreements, made as a part of the original contract, may be bad policy for both Union and company alike. (As this case evidences. See also *Central States Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc*, 854 F2d 1074, 1078 (7th Cir 1988).) But there is no federal policy requiring that all parts of a collective bargaining agreement be in writing. *Certified Corp v. Hawaii Teamsters*, 597 F2d 1269, 1272 (9th Cir 1979). The parties are free to structure their agreement as they wish.

Nonetheless, plaintiffs argue that admission of the oral reopener is contrary to the parol evidence rule. There is no doubt that there is a parol evidence rule for collective bargaining agreements, *Mohrv. Metro East Mfg*, 711 F2d 69, 72 (7th Cir 1983), and no doubt that the evidence and the agreement is parol. But the rule does not bar all parol evidence: parol evidence is only suppressed where the contract makes clear that the parties intended the written agreement to be a "complete expression of the agreement that they had reached, to the exclusion of all prior negotiations, whether oral or written." Farnsworth, Contracts 451 (1982).

In this case, there is no clear indication that the parties intended the written agreement to be a complete expression of all prior negotiations, and therefore that remains an issue for trial. The clause closest to an integration clause differs in an important respect from ordinary integration clauses. It

states

> This agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the employer and the union.

Unlike the traditional integration clause, there is no representation that the agreement represents the complete understanding of the parties, and merges all prior and contemporaneous understandings. Therefore, there is no clear predicate for applying the parol evidence rule to exclude evidence of an oral agreement.

The motion to exclude evidence of an oral reopener agreement is DENIED. The parties are directed to present evidence on the ratification requirement sufficient to allow the jury to answer the questions outlined above.

11. REMAINING QUESTIONS ON DAMAGES

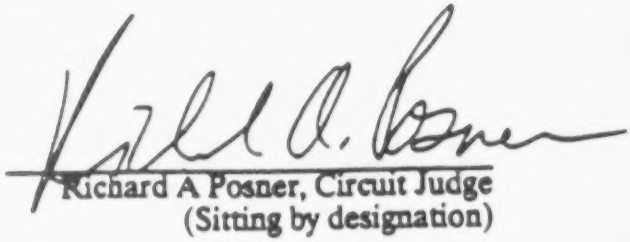
Left are two issues concerning damages if the jury finds JEWEL breached the collective bargaining agreement. The parties have stipulated as to compensatory damages. MERK has asked for prejudgment interest; JEWEL has asked that the class be reduced to exclude those employees who were hired at the lower wage rate.

Neither party has moved for summary judgment on these questions, but I believe it would be helpful for me at this stage to rule on the questions, subject to reconsideration following briefing after the trial. Therefore, I rule that

(1) the plaintiffs are entitled to prejudgment interest as a matter of law. *Gorenstein Enterprises v. Quality Care-USA*, 874 F2d 431, 436 (7th Cir 1989).

(2) the plaintiff class should be reduced by excluding those employees who were hired after the unilateral wage reduction.

I will address more fully the reasoning behind this second conclusion in a written opinion to be issued before the end of trial. Again, I will reconsider either ruling upon motion after the conclusion of the trial, if in fact plaintiffs prevail, and after each side has had an opportunity to fully brief the questions raised.



Richard A Posner, Circuit Judge
(Sitting by designation)

Date: January 25, 1990

APPENDIX G

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 27, 1988.

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

KELLY MERK, et al.,
Plaintiffs-Appellees,

No. 86-2723 *v.*

JEWEL COMPANIES, INC.,
Defendant-Appellant.

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 85 C 7876

Marvin E. Aspen,
Judge

ORDER

Defendant-Appellant filed a petition for rehearing and suggestion of rehearing en banc on June 14, 1988. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX H

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 20, 1991

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, Jr., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

KELLY MERK, JOSEPH STASZEWSKI, and VICKIE MENAGH, et al.,
Plaintiffs-Appellants,
vs.
JEWEL FOOD STORES DIVISION OF JEWEL COMPANIES, INCORPORATED, et al.,
Defendants-Appellees.

No. 90-2184

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 85 C 7876
Richard A. Posner, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause, a vote of the active members of the court was requested, and a majority of the active members of the court have not voted to grant rehearing in banc.[1] A majority of the judges on the original panel have voted to deny rehearing. Accordingly,

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[1] Judges Wood, Jr., Flaum, Easterbrook, Manion and Kanne voted to grant rehearing in banc.

Judge Richard A. Posner took no part in consideration of this appeal.

It is ORDERED that the aforesaid petition for rehearing and petition for rehearing in banc be, and the same is hereby DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KELLY MERK, JOSEPH STASZEWSKI, VICKIE MENAGH, DONNA McCORMICK, DAVID THERKIELD, JOHN MALONE, MARLENE WAGNER, MICHAEL DEMARE, WAYNE VOLKER, ELEANORE COLLINS, ANDREW KACHIK and PATRICIA TODD, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JEWEL FOOD STORES DIVISION, JEWEL COMPANIES, INC., AMERICAN STORES COMPANY, INC., and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 881, Chartered by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO and CLC,

Defendants.

NO. 85 C 7876

MEMORANDUM ORDER

MARVIN E. ASPEN, District Judge:

A.

For the reasons that follow, Jewel's motion to reconsider the Court's June 26, 1986 opinion is denied.

With respect to the "duty of fair representation" issue, *see* June 26 opinion at 6-16, Jewel says little it did not say earlier, and we adhere to our analysis in the opinion. Jewel continues to give short shrift to the nature and depth of the conflict of interest in this case. We agree with Jewel's uncontroversial premise that unions often balance conflicts between groups of employees, and that under typical labor law cases they still have a duty to represent all groups fairly. But the conflict in this case is special and unusual, as it involves *former* employees with a

discrete conflict of interest with current employees. As the *Allied Chemical* case teaches, 404 U.S. at 172-75, 92 S.Ct. at 394-96, where conflicts between current and former employees are sharp, and where a powerful majority group with many interests will likely dominate a discrete minority with limited interest, the former employees can no longer be considered appropriate members of the bargaining unit, subject to the union's representation. We continue to believe that *Allied Chemical* is closely analogous to this case, and that it supports our holding that the Union owed no duty to plaintiffs.

Also, despite Jewel's arguments to the contrary, we continue to believe that this case is rare and poses no threat to the sanctity of the collective bargaining system. We disagree with Jewel that our opinion will give an incentive to employees involved in a labor dispute to quit and seek an individual remedy rather than stay on the job, bound to the Union's representations. More likely than this far-fetched scenario is the other side of the coin: a holding contrary to ours could encourage unscrupulous employers to cut wages and benefits unilaterally and drag out a battle with a union, hoping that, as employees leave as part of normal attrition during the long delay, it could play upon the conflict between former employees and union members and save money by reaching a settlement freezing out those employees who left. In any event, putting aside speculation about the effect of our holding on future cases, we think that the failure of the parties and the Court to find reported cases like this one demonstrates that this type of case will not be common, and that the impact of our holding is limited to the unusual fact pattern of this case.

Turning to the statute of limitations issue, we find that Jewel offers nothing significant that it did not argue earlier. We stand by our opinion and deny that part of the motion to reconsider as well.

B.

We grant Jewel's motion to certify an interlocutory appeal and to stay proceedings in this Court pending the appeal. Under 28 U.S.C. § 1292(b), a district court may certify an interlocutory appeal if when it enters an order and believes that the order

(1) involves a controlling question of law,

(2) as to which there is substantial ground for difference of opinion, and

(3) that an immediate appeal may materially advance the ultimate termination of the litigation.[1]

The first two criteria are easily met in this case. Our June 26 opinion and order involved two such controlling questions, one involving the duty of fair representation and the second the proper statute of limitations. At minimum a question is controlling when it would constitute reversible error on appeal if wrongly decided. *See, e.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974), *cert. denied*, 419 U.S. 855 (1974); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure*, § 3930 (1977) at 159. Both questions plainly meet this standard; they are pivotal. Moreover, there is substantial ground for difference of opinion with respect to both questions. As our opinion described, there was no good precedent for either issue. We had an unusual fact situation falling into a gap in both doctrines analyzed, and the correct answer is not obvious.

We also find that the third criterion for interlocutory review is met. Limitations issues are particularly appropriate under this element if the other elements are met, since decision of the issue might dispose of the suit, or at least drastically curtail its scope. *See, e.g., Willmar Poultry Co. v. Morton-Norwich Prods., Inc.*, 520 F.2d 289, 291 n.2 (8th Cir. 1975); 16 Wright & Miller, § 3931 at 181. Similarly, immediate appeal of the duty of fair repres-

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[1] That section reads in full:

> (b) When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

entation issue may also bring a speedier and more efficient end to this suit. If we are reversed, we will avoid going to trial on the merits without the Union; the shape and direction of the suite differs significantly depending on the Union's presence in the suit. As we noted in our June 26 opinion at 5, plaintiffs' two theories of recoveries are mutually exclusive. It will ultimately. save cost and time to resolve finally this watershed issue as early as possible.

For all the above reasons, certification of an interlocutory appeal is warranted here. We also believe a stay of lower court proceedings pending appeal is proper here. The next status hearing is hereby set for January 9, 1987, for a report on the progress of the appeal. The parties shall also report promptly any decisions or significant order of the Court of Appeals in this case. It is so ordered.

C.

The motions of Jewel and the Union to consolidate this case with No. 85 C 10362 as related under Local Rule 2.31 are granted. We find that the criteria of that Rule are satisfied.

D.

In conclusion, Jewel's motion to reconsider is denied. The motions to consolidate this case with No. 85 C 10362 are granted, as well as Jewel's motion to certify an interlocutory appeal under 28 U.S.C. §1292(b). It is so ordered.

/s/ MARVIN E. ASPEN

MARVIN E. ASPEN
United States District Judge

DATED 8/13/86

APPENDIX J

STATUTES INVOLVED

Federal Statutes:

29 U.S.C. § 159(a).

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 160(b).

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint

may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

29 U.S.C. § 173(d).

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 U.S.C. § 185(a).

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

(a) JUDGMENT AS A MATTER OF LAW.

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) RENEWAL OF MOTION FOR JUDGMENT AFTER TRIAL; ALTERNATIVE MOTION FOR NEW TRIAL. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment

to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(c) SAME: CONDITIONAL RULINGS ON GRANT OF MOTION FOR JUDGMENT AS A MATTER OF LAW.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party against whom judgment as a matter of law has been rendered may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment.

(d) SAME: DENIAL OF MOTION FOR JUDGMENT AS A MATTER OF LAW. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

APPENDIX K

ARTICLE IX
NO STRIKES; NO LOCKOUTS; GRIEVANCES & ARBITRATION

Section 9.1 No Strikes; No Lockouts

The Union and the Employer agree on the need for the continuance of their service to the public without interruption. Both recognize this objective as necessary to the security of the Employer and its people. Both, therefore, specifically pledge themselves to help assure that security by using the procedures agreed upon between them for the adjustment of disputes and grievances in all cases where there is any difference of opinion concerning the rights of either under this Contract or the interpretation or application of any provision of it. Therefore, during the term of this Agreement there shall be no strikes, stoppages, diminution or suspension of work of any kind whatsoever on the part of the Union or its membership; nor shall there be any lockout on the part of the Employer.

Section 9.2 Grievances

(A) Grievance Defined

A grievance is hereby defined as any dispute involving the interpretation or application of the provisions of the Contract.

(B) Procedure

A grievance may be initiated by any individual employee, by the Union or by the Employer. Once initiated, the following steps shall be taken to settle such grievance:

Step 1: By conference between the aggrieved employee, the shop steward, or both, and the Store Manager or Resident.

Step 2: By conference between a Union representative and the Store Manager and/or the Divisional Manager or other representative designated by the Divisional Manager.

Step 3: By conference between a Union representative and the Grocery Operating Manager or such other official as the Employer may designate to represent it in such conference.

Any grievance initiated or carried to Step 3 shall be reduced to writing. Grievances involving only one store shall be introduced only at Steps 1 or 2, while grievances involving more than one store may be introduced at any step. All grievances shall be investigated and answered promptly.

(C) Time Limits on Grievances

Any grievance involving a claim of improper discharge or other discipline must be presented within fifteen (15) days after discharge or disciplinary action. All other grievances excluding discharge or disciplinary action must be made within thirty (30) calendar days after the cause giving rise to the grievance becomes evident. Wage claims involving the proper application of wage rates shall not be valid and collectible for a period earlier than 180 calendar days prior to the date of filing the claims. All other wage claims as to the number of hours worked shall not be valid and collectible for a period earlier than ninety (90) days prior to the date of filing the claim.

Section 9.3 Arbitration

(A) Either the Union or the Employer may, within thirty (30) calendar days after failure to adjust the grievance in accordance with the grievance procedure, serve upon the other party a written demand for arbitration stating the issue to be arbitrated. The parties shall endeavor to select an impartial arbitrator. However, if the parties fail to agree upon an arbitrator who is willing and able to serve within fifteen (15) calendar days after service of the demand for arbitration, either party may, within seven (7) calendar days thereafter, request the American Arbitration Association to submit a list of not less than five (5) disinterested persons who are qualified and willing to act

as impartial arbitrators. Upon receipt of this list, an authorized representative of the Union and of the Employer shall flip a coin to determine who shall have first choice to strike a name. The party winning the toss shall then strike a name from the panel. Thereafter, the parties shall alternately strike one name each until only one name remains. The person whose name remains shall be the selected arbitrator.

(B) The arbitrator shall commence hearings as quickly as possible after his selection and shall render his award in writing together with his written findings and conclusions as quickly as reasonably possible after the hearing. The award shall be final and binding upon the parties to this Agreement and upon the complaining employee or employees, if any.

The arbitrator shall have no power to determine arbitrability nor to add or substract from, modify, or amend any provision of this Agreement, nor to substitute his discretion for the discretion of the Union or the Employer, change existing wage rates, or arbitrate proposals for the amendment or renewal of this Agreement.

The arbitrator's fees and expenses, the cost of any hearing room and the cost of a shorthand reporter and of the original transcript shall be borne equally by the parties. All other cost and expenses shall be borne by the party incurring them.

(C) For the purpose of entertaining a written request from either of the parties for rehearing to correct any material error of omission or commission, ambiguity, or question of application allegedly evident in the opinion or award the arbitrator shall, for a period of seven (7) calendar days next following the date of his award, retain jurisdiction of the matter submitted to arbitration by the parties hereto, and until the expiration of the period of time stated in this provision for rehearing the award shall not

be deemed to have been issued. If, however, no request for rehearing is duly filed within this seven (7) day period, this award shall be deemed to be issued effective as of its date. A written request for rehearing shall detail the specific grounds relied upon for alleging a material error, or ambiguity, and a copy thereof shall be mailed by certified mail to the other party or parties. If the written request is postmarked no later than the seventh (7th) day next following the date this award, it shall extend the jurisdiction of the arbitrator for a period of seven (7) days next following the date of the written request. Within those seven days the arbitrator, having reexamined the matter, shall in writing either reject the request for a rehearing or set a date for the requested rehearing. If the request for rehearing be denied, this award shall thereupon be deemed to be issued effective that date and the jurisdiction of the arbitrator shall accordingly cease. If the request for rehearing be granted, the jurisdiction of the arbitrator shall continue until issuance of a final amended award incorporating or rejecting the substance of the allegations contained in the request.

(D) The participation by the parties in an arbitration proceeding under this Agreement shall not be deemed a waiver of or prejudicial to the right of either party to contest the arbitrability of the grievance or the jurisdiction and authority of the arbitrator in proceedings to set aside the award or in other appropriate proceedings in any State or Federal court of competent jurisdiction; provided such judicial proceedings are instituted within thirty (30) days of the date of the arbitrator's award.

APPENDIX L

United Food & Commercial Workers
International Union, AFL-CIO & CLC

February 17, 1984

Mr. P. Neill Petronella
Group Vice President
External Affairs and General Counsel
Jewel Food Stores
1955 West North Avenue
Melrose Park, Illinois 60160

RE: UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 881 - JEWEL FOOD STORES - CHICAGO METROPOLITAN AREA CONTRACT

Dear Mr. Petronella:

On February 16, 1984 we responded to your letter of the same date and stated in part as follows:

> "We are prepared to submit to immediate arbitration the issue of whether you are legally entitled to implement such changes."

Implementing our position in this regard, the Union herewith files a grievance pursuant to Section 9.2 of the contract protesting your announced cut of contract wages, vacations and personal holidays, effective February 26, 1984.

Needless to say there is a serious dispute between us as to whether the Company has the right to unilaterally make mid-term contract modifications. Under the contract this dispute can be resolved through arbitration. It is in the best interest of all concerned that this be done as quickly as possible and hopefully before the first payday following February 26, 1984. We ask that the steps of the grievance procedure, all of which are irrelevant given the nature of the dispute, be waived and that the parties immediately proceed to select an arbitrator in accordance with Section 9.3 of the contract.

Because of the urgency of this matter we ask that you respond to this letter as promptly as possible.

Very truly yours,

Ronald E. Powell
President

REP:sh
cc James Henson, President,
Jewel Food Stores,
Marshall Collins, Executive Vice president,
Jewel Food Stores

RONALD E. POWELL
President

THOMAS J. WALSH
Secretary/Treasurer

LOCAL 881
9865 W. Roosevelt Road
Westchester, IL 60153
(312) 681-1000

M-1

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

CASE NO. 13-04-24018

DATE FILED: February 22, 1984

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. NAME OF EMPLOYER: JEWEL FOOD STORES DIVISION, JEWEL COMPANIES, INC.

b. NUMBER OF WORKERS EMPLOYED: 16,000

c. ADDRESS OF ESTABLISHMENT: 1955 West North Ave., Melrose Park, IL 60160

d. EMPLOYER REPRESENTATIVE TO CONTACT: Neill Petronella

e. PHONE NO.: (312) 531-6423

f. TYPE OF ESTABLISHMENT: Retail food store

g. IDENTIFY PRINCIPAL PRODUCT OR SERVICE: Retail foods

h. THE ABOVE NAMED EMPLOYER HAS ENGAGED IN AND IS ENGAGING IN UNFAIR LABOR PRACTICES WITHIN THE MEANING OF SECTION 8(a), SUBSECTIONS (1) AND (5) OF THE NATIONAL LABOR RELATIONS ACT, AND THESE UNFAIR LABOR PRACTICES ARE UNFAIR LABOR PRACTICES AFFECTING COMMERCE WITHIN THE MEANING OF THE ACT.

2. BASIS OF THE CHARGE:

On or about October 20, 1983, the Employer executed a Contract with the Charging Union which by its terms is effective from September 19, 1982 to June 15, 1985. On or about December 20, 1983, the Employer requested that the Union

meet with it to discuss reduction in wages and other Contract benefits. Notwithstanding the fact that the Union had no legal obligation to do so, it did meet with the Employer. At such meeting, on January 26, 1984, the Employer proposed that wages be reduced by as much as $1.75 per hour and that Contract vacation and holiday benefits be reduced. Notwithstanding the fact that the parties were discussing mid-term Contract concessions, The Employer declared that its proposal was a "final offer" and that the parties were at "impasse." Accordingly, in wilful disregard of the law and the Contract rights of the employees, the Employer declared that it would implement its "final offer" unless accepted by the membership by midnight, February 15, 1984. On February 16, 1984, the Employer announced that its "final offer" not having been accepted by its deadline, would be implemented effective Sunday, February 26, 1984. The Employer's conduct in this regard is wilful breach of the Collective Bargaining Agreement and a flagrant violation of the Act.

BY THE ABOVE AND OTHER ACTS, THE ABOVE-NAMED EMPLOYER HAS INTERFERED WITH, RESTRAINED, AND COERCED EMPLOYEES IN THE EXERCISE OF THE RIGHTS GUARANTEED IN SECTION 7 OF THE ACT.

3. FULL NAME OF PARTY FILING CHARGE: United Food & Commercial Workers Union, Local 881

4a. ADDRESS: 9865 West Roosevelt Road, Westchester, Illinois 60153

4b. TELEPHONE NO.: (312) 681-1000

5. FULL NAME OF NATIONAL OR INTERNATIONAL LABOR ORGANIZATION OF WHICH IT IS AN AFFILIATE OR CONSTITUENT UNIT: United Food & Commercial Workers International Union, AFL-CIO, CLC

6. DECLARATION:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: /s/ ROBERT KARMEL Attorney

Robert Karmel
Karmel & Rosenfeld
221 North LaSalle Street, Suite 1963
Chicago, Illinois 60601

Telephone: 312/641-2910

Date: February 22, 1984

LAW OFFICES OF
KARMEL & ROSENFELD
221 NORTH LA SALLE STREET
CHICAGO, ILLINOIS 60601
(312) 641-2910

ROBERT KARMEL
NEAL D. ROSENFELD
JONATHAN D. KARMEL
JAIRUS M. GILDEN

LOUIS L. BIRD
OF COUNSEL

June 24, 1985

Donald J. Crawford, Regional Director
National Labor Relations Board
Region 13
219 South Dearborn Street
Chicago, Illinois 60604

Re: Jewel Food Stores Division of Jewel Companies
Case No. 13-CA-24018

Dear Mr. Crawford:

We are please to report that UFCW Local 881 and Jewel have fully settled the contract dispute which underlies the above-captioned case. The settlement was ratified by the membership through a mail ballot election. The ballots were counted on June 21, 1985 and the results are as follows:

6367 to accept
1053 to reject
69 void ballots
7489

The terms of the settlement are explained in detail in the enclosed booklet, which was mailed to the employees with the mail-in ballot. With certain limited exceptions as noted in the booklet, the settlement restores rates of pay and length of service progressions to the level that existed prior to the February 26, 1984 wage cuts and provides for 100% back pay for all employees in service on the date of ratification. Vacations that were cut will be restored effective January 1, 1986 and personal days that were eliminated will be restored on a pro rata basis on July 1, 1986. The settlement also provides for an extension of the contract to October 4, 1986.

Because this contract settlement fully and fairly resolves the dispute resulting from Jewel's unilateral reduction in wages, personal days and vacation benefits, the Union requests that its Charge and the Complaint be withdrawn. The Union is satisfied that no sound purpose could be served by continuing with this case. On the contrary, the Union believes that additional litigation would be injurious to its relationship with the Employer which has now been restored to its earlier harmonious level. Further, the Union believes that the settlement with its restoration of contract wages and benefits with full back pay fully effectuates the purposes and objectives of the Act.

Very truly yours,

KARMEL & ROSENFELD

Robert Karmel

RK:ev

cc: Kovar Nelson & Brittain
UFCW Local 881

E. ALLAN KOVAR

Date 6-25-85

Time 11a

M-6

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

JEWEL FOOD STORES, DIV.,
JEWEL COMPANIES, INC.

and Case 13-CA-24018

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 881

ORDER GRANTING REQUEST TO WITHDRAW CHARGE, DISMISSING COMPLAINT AND WITHDRAWING NOTICE OF HEARING

Upon request of the Charging Party to withdraw the charge filed in the above-captioned matter, pursuant to Section 102.9 of the Board's Rules and Regulations, Series 8, as amended,

IT IS HEREBY ORDERED that the request of the Charging Party to withdraw the charge heretofore filed herein be, and the same hereby is, granted, and

IT IS FURTHER ORDERED that the Complaint heretofore issued herein be, and it hereby is, dismissed, and

IT IS FURTHER ORDERED that the Notice of Hearing heretofore issued herein be, and it hereby is, withdrawn.

DATED at Chicago, Illinois, this 25th day of July, 1985.

/s/ DONALD J. CRAWFORD

Donald J. Crawford, Regional Director
National Labor Relations Board
Region 13
Everett McKinley Dirksen Building
219 South Dearborn Street, Room 881
Chicago, Illinois 60604

APPENDIX N

Instruction Number 15.

If you do not believe that the written agreement was intended by the parties to be a complete expression of their agreement, then you may consider evidence of any oral agreements made between Jewel and the Union. The Defendant claims that there was an oral reopener agreement. The Plaintiffs argue that even if there was an oral agreement besides the written collective bargaining agreement, that oral agreement is invalid because it was not ratified by the union members.

An agreement between a union and a company must be ratified by the union members only if the Union's own rules require that all agreements must be ratified. But even if the rules require ratification, if the Union and the company have a practive of ignoring the ratification requirement, then the company may rely on an agreement even though it has not been ratified by the employees — that is, if there is a practice of ignoring the ratification requirement for some agreements, an agreement is not necessarily invalid because unratified.

Therefore, you must first determine whether the Union rules required the employees to ratify all parts of the collective bargaining agreement. If the Union rules did not, then an oral agreement would be valid even though it was not ratified.

If you find that the rules did require ratification, you must then determine whether the Defendant knew that ratification was required, and knew that the agreement was not ratified. If the Defendant did not know that the Union rules required ratification, or did not know that the reopener agreement was not ratified, then the reopener agreement could be valid even if it was not ratified.

If you find that the Defendant knew ratification was required and that an oral agreement was not ratified, then you must decide whether there was a practice between Jewel and the Union of making agreements that were not ratified. I instruct you that if you find that there was such a practice, then you may not find that an oral agreement was invalid simply because it was not ratified.

APPENDIX O

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK ACKLEY and STEVEN COLE,
Plaintiffs-Appellants,

v.

WESTERN CONFERENCE OF TEAMSTERS, et al.,
Defendants-Appellees.

Nos. 90-55438, 90-55702

D.C. No. CV-88-6146-DMT

OPINION

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted
May 10, 1991—Pasadena, California

Filed February 21, 1992

Before: Thomas Tang, Stephen Reinhardt and Charles Wiggins, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Labor/Attorneys' Fees

Affirming in part and reversing in part a district court judgment of dismissal pursuant to Fed. R. Civ. P. 41(b), the court of appeals held that the equal rights and freedom of speech guarantees of Sec. 101(a) of the Labor-Management Reporting and Disclosure Act (LMRDA) does not require union

leaders to make a full disclosure of all of the terms and provisions of a CBA prior to submitting the agreement to the union membership for ratification.

Appellants Frank Ackley and Steven Cole were Teamsters union members employed by Matlack Inc., a nationwide hauling company. During negotiations involving a collective bargaining agreement, the union leadership recommended that the members accept a third proposed agreement consisting entirely of monetary changes. However, the new agreement contained a number of changes to nonmonetary provisions of the previous contract that had not been disclosed to the membership. Appellants filed suit against the employer under section 101 of the LMRDA and section 301 of the Labor-Management Relations Act (LMRA) claiming that the union's failure to disclose material changes in the CBA prior to the ratification vote violated the equal voting rights and freedom of speech provisions of section 101 and breached the duty of fair representation requried by section 301. However, appellants did not allege that there was any breach of the union constitution or bylaws or set forth any cause of action under section 301 based on such breach. Although the district court granted the employer's motion to dismiss under Fed. R. Civ. P. 41(b), it awarded the employer attorneys' fees.

[1] The court did not need to determine whether or not the district court erred in its findings of fact in view of the court's conclusions that, as a matter of law, the LMRDA does not provide a right to the disputed information, and that, regardless of the truth or falsity of the challenged finding, appellants' cause of action for breach of the duty of fair representation fell on other grounds, and the fact that no cause of action for breach of the union's constitution or bylaws was alleged. [2] In light of the court's conclusion that the LMRDA imposes no minimum disclosure requirements on union officials, at least when there is no statutorily created right to vote on the subject at issue, and its conclusion that no equal protection issue arose when all of the rank-and-file members were

treated identically, the court concluded that the exclusion of proffered testimony concerning the materiality of undisclosed contract changes did not prejudice appellants with respect to their LMRDA cause of action. The court also concluded that appellants were also not prejudiced with respect to their duty of fair representation claim. [3] In this case, appellants proffered no evidence whatsoever that the employer would have been disposed to agree to more generous terms had the union rejected the proposed agreement a third time. Accordingly, appellants failed completely to satisfy the second prong of the *Acri* test. Thus, their claim that the union leaders breached their statutory duty of fair representation was properly dismissed. [4] In addition, the district court properly rejected the argument that the union leadership's decision to withhold from the rank-and-file membership information regarding the nonmonetary terms of the proposed collective bargaining agreement violated the equal rights guarantees to union members of section 101 of the LMRDA. [5] That section is an anti-discrimination provision, pure and simple. Here, no discrimination against any member or group of members occurred. [6] Also, the question whether the information provided was biased toward a particular outcome was irrelevant for purposes of that section. The anti-discrimination provision was not intended to cover the type of information disparity complained of by appellants. [7] Neither was the withholding of information from union members during the CBA ratification meetings a violation of the LMRDA's guarantees of freedom of speech and assembly. [8] The LMRDA does not require that union members be given the opportunity to ratify collective bargaining agreements negotiated by their bargaining representatives. That right is provided, if at all, by the union's constitution or bylaws. The court concluded that it is the breach of the union's internal rules that must serve as the basis for any complaint that insufficient information was provided to the membership prior to or at the time of ratification of a contract. Section 101 of the LMRDA affords no remedy for such a breach. [9] Here, although the Teamsters constitu-

tion provided a right to vote on contract ratification and the nature and extent of that right was subject to union regulation, appellants failed to allege any violation of the union's rules and failed to plead any cause of action for such breach. [10] Because appellants did not allege any breach of the union's internal rules, the court did not decide whether they had established such a breach, and if so, whether they were entitled to relief under section 301 of the LMRA.

[11] Although appellants' substantive claims were meritless, the court found no basis in law for the district court's award of attorneys' fees to the employer and the union. The rationale for a "common benefit" award is entirely inapplicable to cases in which a union defendant prevails against a member's or members' claim for relief under the LMRDA. [12] Nor could the award be justified on any other ground. There was no allegation that appellants willfully disobeyed a court order or acted in bad faith. Therefore, the award of attorneys' fees was reversed.

COUNSEL

Julie Fosbinder, Tucson, Arizona, for the plaintiffs-appellants.

Paul Alan Levy, Public Citizen Litigation Group, Washington, D.C., for the plaintiffs-appellants in no. 90-55702.

Michael J. Shelley, Robert Vogel, Wohlner, Kaplon, Phillips, Vogel, Shelley & Young, Encino, California, for the defendant-appellee.

OPINION

REINHARDT, Circuit Judge:

The primary question presented by this case is whether the equal rights and freedom of speech guarantees of section

101(a) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a) (1988), require union leaders to make a full disclosure of all of the terms and provisions of a collective bargaining agreement prior to submitting the agreement to the union membership for ratification. We hold that they do not. There is no provision in the LMRDA that requires that a labor contract be submitted to the membership for ratification. Rather, the question of contract approval constitutes an internal union affair. It is left to the union and its membership to determine whether ratification is required, and if so, what procedures apply. Ordinarily, it is the union's constitution or bylaws that govern these matters (although in rare instances a successful action for breach of the duty of fair representation might be brought). However, a failure to follow the union's internal rules, including its procedures governing contract ratifications, constitutes a violation of the union's obligations to its members, and is actionable as a breach of contract under section 301(a) of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185(a) (1988). No such breach is alleged here and no remedy is sought, under § 301(a) or otherwise, for any violation of the union's constitution or bylaws. Accordingly, we affirm the district court's grant of defendant's motion to dismiss pursuant to Fed. R. Civ. P. 41(b).

I

Appellants Frank Ackley and Steven Cole are Teamsters employed by Matlack, Inc., a nationwide hauling company. Together with approximately 300 other Teamsters employed in Matlack's western region, they were covered by the 1988-1991 Master Tank Agreement negotiated between Matlack and appellee Western Conference of Teamsters (WCT), a subordinate organization of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO. The Matlack Teamsters covered by the agreement belong to six local unions affiliated with WCT.[1]

[1]These locals include appellee Local 692 in Long Beach, California; Local 495 in Los Angeles, California; Local 315 in Martinez, California;

Ackley and Cole are members and shop stewards of Local Unions 692 and 315, respectively.

Prior to 1988, members of the six locals were covered by a multi-employer collective bargaining agreement between WCT and the Western States Bulk Commodity Haulers Association, of which Matlack is a member. The multi-employer agreement expired in June, 1988. In 1987, Matlack notified WCT of its intent to withdraw from the multi-employer bargaining arrangement and bargain independently with the union. Matlack subsequently filed petitions with the National Labor Relations Board (NLRB) to request that the NLRB certify three separate collective bargaining units for the upcoming negotiations. The NLRB instead determined that the local unions composed of Matlack employees would constitute a single collective bargaining unit. Negotiations with WCT and the business representatives of the six local unions commenced in or about May, 1988. To counter Matlack's attempts to break up the bargaining unit, the union negotiators agreed not to release information about proposed terms and conditions to the membership until a complete agreement was ready for ratification.

The Teamsters' constitution requires membership ratification of collective bargaining agreements negotiated by the union leadership, but does not specify the particular method to be used. Prior to 1988, on all occasions except one, ratification of agreements negotiated by WCT occurred as the result of a mail referendum. Members received written disclosure of proposed changes in the union contract approximately ten days before ballots were due. In 1982, ratification occurred at a series of open meetings held in the local unions. At the local unions' 1988 pre-negotiation meetings, the membership

Local 291 in San Leandro, California; Local 81 in Portland, Oregon; and Local 741 in Seattle, Washington. Local 690, in Spokane, Washington, was not affected by the 1988-1991 agreement.

approved an open meeting ratification procedure for the 1988-1991 agreement.[2]

On August 12, 1988, local union leaders notified the membership that ratification meetings would be held in each local union on August 14. Ackley contacted the business representative for Local Union 692 to request information about the terms of the proposed agreement, but his request was refused. The business representative for Local Union 315 read Cole a summary of the terms of the proposed agreement over the telephone, and stated in response to a question from Cole that no other changes had been made. At the ratification meetings held on August 14, union leaders read the same summary to the membership. The summary of terms included changes to the monetary terms of the collective bargaining agreement, but omitted proposed changes to other provisions of the contract. The union leaders urged the membership to reject the proposed agreement, and ratification failed by a vote of 148 to 4. Cole spoke out against ratification; Ackley was silent.

On August 17, the membership was notified of a second set of ratification meetings to take place on August 21. Both Ackley and Cole again contacted their business representatives, and both were read a summary of the provisions of the proposed agreement. Again, this summary included only changes to the monetary terms of the previous contract. At the meeting, union leaders again read the summary of terms to the membership and again recommended that the members reject the agreement. The agreement was defeated by a vote of 168 to 28. Again, Cole argued against ratification and Ackley was silent.

On August 25, the Matlack Teamsters were notified that a third set of ratification meetings would occur on August 28.

[2]During the pre-negotiation meetings, the Matlack Teamsters were also given an opportunity to submit suggestions regarding desired changes to the terms of the previous (1985-1988) agreement.

When Cole and Ackley telephoned their respective business agents for information about the third proposed agreement, the agents refused to release information prior to the meetings. The day before the meetings, Ackley's agent finally agreed to let Ackley examine the agreement. Ackley spent three hours at Local 692 going over the document, but he did not bring a copy of the 1985-1988 agreement with him for purposes of comparison.

This time, unlike the first two times, the union leadership recommended that the members accept the third proposed agreement. Again, the leaders read or distributed a summary of terms that consisted entirely of monetary changes.[3] Although Ackley testified that he had spoken to a number of drivers before the meeting to indicate that he wished to delay the vote, he did not ask to address the members at the meeting or call for a delay or further discussion. Cole again argued against ratification, and his local, Local 315, voted to reject the agreement. However, the bargaining unit as a whole voted 95 to 75 in favor of ratification. According to the testimony of plaintiffs' witnesses, the new 1988-1991 agreement included a number of changes to nonmonetary provisions of the previous contract that had not been disclosed to the membership.

Ackley and Cole filed suit against WCT, Local Union 692, and Matlack under section 101 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411, and section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185. They claimed that the union's failure to disclose material changes in the collective bargaining

[3]Appellees claim that Cole has admitted that the entire agreement was read and distributed at Local 315. According to Cole, his affidavit stating that "the agreement" was distributed referred to the one-page summary of monetary terms that he believed contained all of the changes to the previous agreement. There can be little doubt that the entire agreement, which exceeded 140 pages, was not distributed.

agreement prior to the ratification vote violated the equal voting rights and freedom of speech provisions of section 101 and breached the duty of fair representation required by section 301. They did not, however, allege that there was any breach of the union constitution or bylaws, or set forth any cause of action under section 301 based on such a breach.

Ackley and Cole initially sought rescission of the 1988-1991 agreement and an injunction regarding the conduct of future ratification votes. They later agreed to the dismissal of Matlack as a defendant and abandoned their claim for rescission in favor of a request for declaratory judgment. A two-day trial was held. At the close of plaintiffs' case, the district court granted defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 41(b). The court's order of dismissal authorized WCT to seek attorneys' fees from plaintiffs. The court later awarded defendants $16,070.40 in attorneys' fees. Ackley and Cole appeal from the district court's order of dismissal and from the supplemental order awarding attorneys' fees. The two appeals were consolidated by order of this court.

II

Appellees contend that because Ackley and Cole have abandoned their claim for rescission of the 1988-1991 agreement and seek only prospective relief, this case should be dismissed as moot. A case is moot when subsequent events have eradicated the effects of the alleged wrong and there is no reasonable expectation that it will recur. *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383 (1979); *Lodge 1380, Bhd. of Ry., Airline & Steamship Clerks (BRAC) v. Dennis*, 625 F.2d 819, 822 (9th Cir. 1980). Appellees note that the 1988-1991 agreement had already been in effect for nearly two years at the time of this appeal, and maintain that any need for relief in connection with future ratification proceedings is wholly speculative.

A case is not moot if the alleged wrong is " 'capable of repetition, yet evading review.' " *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546, 96 S. Ct. 2791, 2797 (1976) (quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S. Ct. 279, 283 (1911)). This standard is met if the duration of the injury is shorter than the time required for litigation, and if there is a reasonable likelihood that the same party will be subject to the injury again. *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 348 (1975); *NAACP v. City of Richmond*, 743 F.2d 1346, 1353 (9th Cir. 1984).

Contrary to appellees' suggestion, the wrong alleged by Ackley and Cole satisfies this standard. When procedural wrongs involving the ratification process are alleged, the length of time a collective bargaining agreement has been in force is irrelevant to the issue of mootness. The relevant time period to be considered in determining whether such wrongs are likely to evade review is the duration of the ratification process itself. Absent impasse, one collective bargaining agreement succeeds another after no more than a few months of negotiation. Litigation of disputes arising out of negotiation and ratification proceedings is not feasible within so short a period. *Cf. First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774, 98 S. Ct. 1407, 1414 (1978) (holding that an 18-month election period is too short to allow complete judicial review of constitutional issues). In this case, litigation has lasted over three years, and the 1988-1991 agreement between WCT and Matlack has already expired.

Moreover, absent a formal resolution to the contrary, there is a reasonable likelihood that WCT and the leadership of the local unions will conduct future ratification votes in the same manner as they did in 1988. *See, e.g., International Org. of Masters, Mates & Pilots v. Brown*, ___ U.S. ___, 111 S. Ct. 880, 885 (1991); *Lodge 1380, BRAC*, 625 F.2d at 822-23. Appellees erroneously imply that Ackley and Cole bear the burden of proving that the conduct at issue is capable of repetition. It is the defendant, not the plaintiff, who must demon-

strate that the alleged wrong will not recur. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 72, 104 S. Ct. 373, 375 (1983). Appellees have offered no such proof.

III

As an initial matter, Ackley and Cole argue that the district court committed a number of errors that require reversal of its ultimate findings. They challenge four of the district court's findings of fact and contend that two of its evidentiary rulings constitute reversible error. We examine each of the alleged errors in turn.

A

We will not overturn a district court's findings of fact unless those findings are clearly erroneous. *Johnson v. United States Postal Serv.*, 756 F.2d 1461, 1464 (9th Cir. 1985). We decline to find error where "ample evidence" supports the findings. *Maykuth v. Adolph Coors Co.*, 690 F.2d 689, 695 (9th Cir. 1982).

The district court found that the local union leadership recommended against ratification of the second proposed agreement. Appellants note that this finding directly contradicts Cole's testimony that the leaders of Local Union 315 supported the proposed agreement. In light of the fact that appellant Ackley's testimony was contrary to that of appellant Cole and the fact that the membership rejected the second proposed agreement by a vote of 168 to 28, we cannot say that the finding is clearly erroneous. In any event, even if an error occurred, it is of no consequence. Plaintiffs offer no explanation, and we can conceive of none, as to how the alleged error could have affected the outcome of this case.

Another finding states that Ackley did not bring a copy of the 1985-1988 agreement with him when he went to Local Union 692 on August 27 to examine the third proposed 1988-

1991 agreement. Appellants concede that this finding is accurate, but challenge it as "misleading." We are not aware of any authority for the proposition that a party may successfully challenge a concededly accurate finding of fact.

The third finding challenged by appellants sets forth the district court's conclusion that at the ratification meetings held in Local Union 692, neither Ackley nor any of the other members asked any questions about the substantive provisions of the proposed agreement. Ackley and Cole claim that Ackley's testimony establishes just the opposite. Ackley's testimony establishes that at various times he discussed his reservations regarding the proposed agreement privately with some of the other drivers, and that immediately prior to the third and final ratification meeting he notified many members of Local 692 of a change that he had discovered in the grievance procedure. However, there is no indication that he or anyone else raised this issue or the possibility of any other undisclosed changes during the meeting. Rather, Ackley's testimony supports the district court's conclusion that he and his fellow Teamsters kept their questions to themselves. Once again, appellants charge that this conclusion is misleading. Once again, however, that charge is simply irrelevant.

[1] Finally, Ackley and Cole challenge the district court's finding that Cole had ample opportunity to learn of and discuss the salient facts regarding the proposed agreement. They contend that this conclusion goes to the heart of their claim for relief under section 101 and therefore is subject to *de novo* review by this court. *Johnson*, 756 F.2d at 1465. At the least, the question whether Cole had ample opportunity to learn of and discuss the terms of the proposed agreement is a mixed question of law and fact. Thus, the district court's finding is arguably subject to *de novo* review under the *Johnson* "ultimate finding" standard. *Id.* However, we need not determine whether or not the district court erred in finding as it did in view of 1) our conclusions that, as a matter of law, the LMRDA does not provide a right to the disputed information,

and that, regardless of the truth or falsity of the challenged finding, plaintiffs' cause of action for breach of the duty of fair representation fails on other grounds, and 2) the fact that no cause of action for breach of the union's constitution or bylaws was alleged.

B

We review evidentiary rulings for abuse of discretion and will not reverse absent some prejudice. *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337, 1340 (9th Cir. 1986). Evidentiary rulings result in reversible error unless it is more probable than not that the result in the district court was untainted by the error. *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 888 (9th Cir. 1991).[4]

During the trial, appellants made an offer of proof as to what the deposition testimony of individual union members would have been had the court granted a continuance of the trial so that the depositions could have been taken. According to the proffer, the individuals would have testified as to the materiality of undisclosed, nonmonetary changes to the collective bargaining agreement. Appellants charge that the district court's exclusion of this evidence impaired their efforts to prove that the Matlack Teamsters were denied a meaningful vote. Appellants made a further offer of proof that, if deposed, the union members would state that they would now vote against ratification. Although the issue is properly one of

[4]In *Pau*, we noted the existence of two different formulations of the test for prejudice in civil cases. 928 F.2d at 888 n.2. Under the rule set forth in *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983), the reviewing court must find prejudice unless it concludes that, more probably than not, the result in the lower court was untainted by the error. By contrast, in *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337, 1340 (9th Cir. 1986), we stated that a reviewing court will find prejudice if it concludes that more probably than not, the lower court's error *did* taint the result. As in *Pau*, we find the distinction between these approaches irrelevant to the present case; therefore, we do not address it.

whether the district judge abused his discretion in denying the requested continuance, we will, for present purposes, treat the ruling as if it constituted a determination to exclude evidence offered by appellants.[5] Even under that standard, however, any error was harmless.

[2] Although we are by no means convinced that the deposition testimony the witnesses would have offered would have been at all credible, it is true that direct testimony regarding the materiality of undisclosed contract changes is relevant to the question whether union members failed to receive information important to the casting of an informed vote. However, as we will explain below, the determinative issue here is not whether the members were able to cast informed votes or even whether the failure to afford the members the information allegedly withheld violated any rights union members enjoy by virtue of the union constitution or bylaws. Rather, in light of appellants' pleadings and the evidence they introduced or attempted to introduce, the principal question is whether the failure to inform the membership fully regarding the terms of the proposed contract violated the free speech or equal protection provisions of the LMRDA. In light of our conclusion that the LMRDA imposes no minimum disclosure requirements on union officials, at least when there is no statutorily created right to vote on the subject at issue, and our conclusion that no equal protection issue arises when all of the rank-and-file members are treated identically, we conclude that the exclusion of the proffered testimony did not prejudice appellants with respect to their LMRDA cause of action. *See* discussion in Part V, *infra*. We also conclude that appellants were not prejudiced with respect to their duty of fair representation claim — a claim which appellants understandably assert with considerably less enthusiasm. As to the

[5]We have been unable to locate a copy of the transcript of the hearing on the request for a continuance, and although it is possible that one could be obtained, or that the facts could be otherwise established, in view of the holding set forth in the text, there is no need to do so.

latter claim, the proposed testimony may have been relevant to the question whether the outcome of the third ratification vote would have been different had fuller information been available, but any error in that respect does not avail the appellants, if for no other reason than that Ackley and Cole failed to show that a different outcome would have induced the employer, Matlack, to make further concessions. *See* discussion in Part IV, *infra*.

The second evidentiary ruling complained of is the district court's exclusion of approximately fifty witnesses who were not listed individually on the plaintiffs' witness list. The charge of error is meritless. Local Rule 9.6 of the Central District of California imposes upon each party a continuing obligation to furnish a list of witnesses to be called in that party's case in chief, and provides that "except for good cause shown, the testimony of any such witness proffered at trial who is not listed upon a party's witness list shall be precluded." Local Rule 9.6 requires an affirmative showing of good cause for failure to comply by the party seeking to call unlisted witnesses; claims of relevance and lack of prejudice are insufficient. Here, no such showing was made. Thus, the district court did not abuse its discretion in excluding plaintiffs' witnesses, but rather properly applied the rules of court.

IV

In granting the union defendants' motion to dismiss under Federal Rule of Civil Procedure 41(b), the district court ruled, *inter alia*, that Ackley and Cole had failed to show a right to relief under section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185 (1988), for a breach of the union's duty of fair representation. We review ultimate findings made pursuant to a Rule 41(b) motion *de novo*. *Johnson*, 756 F.2d at 1465. We note, first, that in their briefs on appeal Ackley and Cole barely succeeded in raising the duty of fair representation issue, if in fact they did succeed. Nevertheless, because it is clear, both from their discussion of the evidenti-

ary rulings and from their objections to the factual findings, that appellants intended to preserve this point before us, we will overlook the obvious procedural inadequacies in their brief.

The statutory authority to represent union members in a collective bargaining process includes an obligation "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 903, 910 (1967) (citation omitted). Ackley and Cole contend that WCT and the local union leadership breached this obligation by failing to disclose changes in the nonmonetary provisions of the proposed collective bargaining agreement to the membership. Because Ackley and Cole failed to establish the requisite elements of such a claim as defined in *Acri v. International Ass'n of Machinists*, 781 F.2d 1393, 1397 (9th Cir.), *cert. denied*, 479 U.S. 816, 107 S. Ct. 73 (1986), the district court's grant of dismissal was proper.

The duty of fair representation extends to the conduct of union officials during the negotiation of a collective bargaining agreement. *Acri*, 781 F.2d at 1397. Union members may maintain an action for breach of the duty of fair representation based on misrepresentations made by union leaders during the ratification process. *Id.* For purposes of the case before us, we assume *arguendo* that such an action can also be brought in the event of a failure to disclose information material to the exercise of an informed vote.[6] However, to prevail in a mis-

[6]The cases that deal with the question whether liability for breach of the duty of fair representation can arise out of a union's interactions with its membership during the contract ratification process have all involved deliberate misrepresentation. The courts are in agreement that such misrepresentations will create liability if the requisite causal nexus can be proved. *Alicea v. Suffield Poultry, Inc.*, 902 F.2d 125, 130 (1st Cir. 1990); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1521 (11th Cir. 1988) (dicta),

representation case — and thus in a nondisclosure case — plaintiffs must demonstrate "a causal relationship between the alleged misrepresentations and their injury." *Id.* They must show that (1) absent the misrepresentations, the outcome of the ratification vote would have been different; *and* that (2) had it been different, the company would have acceded to the union's demands. *Id.*

The *Acri* test for causality, and particularly the second prong, is difficult to satisfy, and rightly so. Generally, the union's internal election and rulemaking processes are the proper vehicle, at least initially, for addressing members' complaints regarding the adequacy of union representation during the bargaining process. *Acri*, 781 F.2d at 1399-1400 (Reinhardt, J., concurring). A union's conduct during bargaining need only fall within " '[a] wide range of reasonableness' " to survive judicial review. *Air Line Pilots Ass'n v. O'Neill*, 111 S. Ct. 1127, 1134 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S. Ct. 681, 686 (1953)). Otherwise, during this era of economic retrenchment and reductions in contract benefits, the bargaining process would be under constant siege in the courts.

Congress created the collective bargaining system in order to promote the peaceful and orderly, yet collective, resolution

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cert. denied, 490 U.S. 1066, 109 S. Ct. 2066 (1989); *Swatts v. United Steelworkers*, 808 F.2d 1221, 1224-25 (7th Cir. 1986); *Acri*, 781 F.2d at 1395, 1397; *Anderson v. United Paperworkers Int'l Union*, 641 F.2d 574, 576-79 (8th Cir. 1981); *Deboles v. Trans World Airlines*, 552 F.2d 1005, 1017-20 (3d Cir.), *cert. denied*, 434 U.S. 837, 98 S. Ct. 126 (1977). No court has yet considered whether mere nondisclosure also constitutes a breach of the union's duty of fair representation, and we need not reach that question here. We are mindful, however, of the difference between malfeasance and nonfeasance in the performance of one's duties, as well as of our admonition in *Retana v. Apartment, Motel, Hotel & Elevator Operators Union*, 453 F.2d 1018, 1025 (9th Cir. 1972), that "it will be the unusual case in which hostile discrimination, bad faith, dishonesty, or arbitrary conduct can be alleged."

of industrial disputes and, ultimately, to ensure the long-term stability of labor-management contracts. *Cf. Carothers v. Presser*, 818 F.2d 926, 934 (D.C. Cir. 1987). Both union members and employers have a strong interest in that result. Accordingly, both benefit from the rule that labor-management contracts will not be lightly set aside. Statements made by union representatives during the contract ratification process furnish insufficient justification for invalidating a collective bargaining agreement, unless a showing is made that but for those statements the ultimate outcome of the bargaining would have been different. *Acri*, 781 F.2d at 1397.

[3] In *Acri*, we affirmed the district court's grant of summary judgment in favor of the union because the plaintiffs conceded that they could not show that the employer would have acceded to their demands even had the union remained on strike. In the case before us, Ackley and Cole proffered no evidence whatsoever that Matlack would have been disposed to agree to more generous terms had the union rejected the proposed 1988-1991 agreement a third time. Accordingly, appellants failed completely to satisfy the second prong of the *Acri* test. Thus, their claim that the union leaders breached their statutory duty of fair representation was properly dismissed.

V

The principal ruling that Ackley and Cole challenge is that they failed to establish any violation of section 101 of the LMRDA, 29 U.S.C. § 411 (1988). Unlike the duty of fair representation claim, appellants argue this point vigorously. Nevertheless, we affirm. Because the union treated all members identically during the ratification process and because the LMRDA does not require that union members be provided with "meaningful" information prior to voting on contract ratification, appellants' section 101 claims lack merit. If there is a remedy for the conduct they complain of, and there well may be, it lies elsewhere.

A

[4] Section 101(a)(1) of the LMRDA guarantees to every union member "equal rights . . . to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings." 29 U.S.C. § 411(a)(1) (1988). Ackley and Cole maintain that the union leadership's decision to withhold from the rank-and-file membership information regarding the nonmonetary terms of the proposed collective bargaining agreement violated this guarantee. In light of the settled law in this circuit regarding section 101(a)(1), the district court properly rejected this argument.

[5] Section 101(a)(1) is an anti-discrimination provision, pure and simple. To state a claim under section 101(a)(1), a union member must allege a denial of rights accorded to other members. *Calhoon v. Harvey*, 379 U.S. 134, 138-39, 85 S. Ct. 292, 295 (1964); *Lodge 1380, BRAC*, 625 F.2d at 826; *see also Grant v. Chicago Truck Drivers*, 806 F.2d 114, 117 (7th Cir. 1986); *Alexander v. International Union of Operating Engineers*, 624 F.2d 1235, 1240 (5th Cir. 1980); *Smith v. United Mine Workers*, 493 F.2d 1241, 1244 (10th Cir. 1974). The facts surrounding the ratification of the 1988-1991 collective bargaining agreement make clear that WCT and the local union leaders furnished the same type and amount of information to all of the Matlack Teamsters and accorded them identical rights to speak at the ratification meetings. No discrimination against any member or group of members occurred.[7]

[7]In *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467 (5th Cir. 1981), the Fifth Circuit reached a result that conflicts squarely with *Alexander* (which it had decided the previous year). Like the case before us, *Christopher* involved allegations that union leaders improperly withheld material information relating to a contract ratification vote required by the union's constitution. No discrimination among members or groups of members was alleged. Nevertheless, the court held that the union's con-

[6] Appellants further argue that the union leaders abused their control over information relating to the contract negotiations by presenting the proposed contract to the membership in the most favorable light. The question whether the information provided was biased toward a particular outcome is irrelevant for purposes of section 101(a)(1). Section 101(a)(1) prohibits discrimination against people, not against ideas. We recognize that the conduct at issue here perpetuated, indeed exacerbated, the customary information gap between the leadership of the union and its rank-and-file members. However, unequal access to information is as inherent in the structure of the collective bargaining system, as it is in our larger democratic system. *See* LMRA § 101, 29 U.S.C. § 159 (1988) (providing for the election and certification of collective bargaining representatives); LMRDA § 401, 29 U.S.C. § 481 (1988) (providing for election of union officials); *Carothers*, 818 F.2d at 934. Union leaders, by virtue of their status as collective bargaining representatives, necessarily possess more information about the progress and projected outcome of collective bargaining than union members. At the time of a ratification vote, the officials will inevitably know more about the final terms of the new agreement than the rank-and-

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duct violated section 101(a)(1), stating that it refused "to read [section 101(a)(1)] to mean that a right created or protected by the statute may be abridged with abandon provided there is an even-handed denial to all." *Id.* at 470. The Eighth Circuit followed *Christopher* without discussion in *Smegal v. Gateway Foods of Minneapolis, Inc.*, 763 F.2d 354, 360 (8th Cir. 1985). (The *Smegal* court cited two other cases, one of which was clearly inapposite and one of which reached a result opposite to that in *Christopher*.)

The holdings in *Christopher* and *Smegal*, however, are squarely at odds not only with the holding of the Supreme Court in *Calhoon*, with prior Fifth Circuit precedent, and with Seventh and Tenth Circuit law, but also with the plain language of the statute, which requires only that "[e]very member of a labor organization shall have *equal* rights and privileges within such organization." 29 U.S.C. § 411(a)(1) (1988) (emphasis added). We decline to give section 101(a)(1) an interpretation that its language is incapable of sustaining.

file members. This would be the case even were we to require advance distribution of the entire agreement (in this case, over 140 pages). Information concerning discussions or informal understandings regarding the intended or actual meaning of ambiguous provisions is of critical importance in implementing union-management agreements. That information would not be available to rank-and-file members in any event. To attempt to ensure equal information for negotiators and members alike would be wholly unrealistic. *Carothers*, 818 F.2d at 934-35. "[I]t is not difficult to imagine how the Union's legitimate role as bargaining representative could be subverted" by such a rule. *Id.* at 934. The anti-discrimination provision of section 101(a) was not intended to cover the type of information disparity complained of by appellants.[8]

[8]In several cases involving section 101(a)(1) claims, courts have read the statute to require that the right to vote on union matters be extended "on an equal basis and in a meaningful manner." *McGinnis v. Local Union 710, Int'l Bhd. of Teamsters*, 774 F.2d 196, 199 (7th Cir. 1985), *cert. denied*, 475 U.S. 1121, 106 S. Ct. 1638 (1986). The "meaningful manner" requirement has allowed the extension of section 101(a)(1) to reach not only facially discriminatory union conduct, but also facially neutral union rules or actions that are discriminatory in effect. *See, e.g., McGinnis*, 774 F.2d at 199-203 (invalidating union rule requiring that elections for union stewards be held in Chicago); *Bunz v. Moving Picture Mach. Operators' Protective Union Local 224*, 567 F.2d 1117, 1122 (D.C. Cir. 1977) (striking down interpretation of union constitution lowering the percentage of votes required to secure passage of a special picket assessment from 67% to 51% after only 59% of the members had voted in favor of the assessment); *see also Trail v. International Bhd. of Teamsters*, 542 F.2d 961, 966 (6th Cir. 1976) (declining to require dismissal of Michigan members' claim that failure to submit a "Michigan Rider" for ratification violated section 101(a)(1) because no factual record had yet been created as to whether "Riders" negotiated for other states had been submitted to members based in those states). To sever the "meaningful manner" gloss from the more fundamental "equal treatment" requirement and allow the former alone to support a claim for violation of section 101(a)(1), however, would flout both the statutory language and scheme as well as ignore the other statutory remedies created by Congress to deal with related ills. As we have explained, section 101(a)(1) was not intended to reach all violations of union members' voting rights, but only those of a certain type. *See also* note 10, *infra*. The federal courts may not respond to union members' failure to bring the correct statutory action by affording a remedy under section 101(a)(1) that is not warranted by the facts alleged.

B

[7] Finally, Ackley and Cole urge that the withholding of information from union members during the ratification meetings violated the LMRDA's guarantees of freedom of speech and assembly. As part of their argument, they contend that the Act requires the passage of a reasonable period of time between the disclosure of contract terms and the balloting. Again, however, appellants have failed to establish a deprivation of any right provided under the LMRDA.

Section 101(a)(2) of the LMRDA guarantees to every union member "the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views . . . upon any business properly before the meeting." 29 U.S.C. § 411(a)(2) (1988). It is settled law that the scope of section 101(a)(2) is not coextensive with that of the first amendment. *United Steelworkers v. Sadlowski*, 457 U.S. 102, 108-11, 102 S. Ct. 2339, 2344-45 (1982). Rather, Congress sought to provide certain basic and fundamental rights to union members, while at the same time avoiding undue judicial interference with the mechanics of union self-governance. *Sheldon v. O'Callaghan*, 497 F.2d 1276, 1281 (2d Cir.), *cert. denied*, 419 U.S. 1090, 95 S. Ct. 681 (1974); *see also Carothers*, 818 F.2d at 934; *Smith*, 493 F.2d at 1244. Thus, section 101(a)(2) expressly provides that the rights it guarantees are "subject to the organization's established and reasonable rules pertaining to the conduct of meetings." 29 U.S.C. § 411(a)(2) (1988).

The courts of appeal have construed section 101(a)(2) to provide a remedy not only for direct reprisals against dissenters, but also for union conduct that inhibits or threatens dissenting speech. *Lodge 1380, BRAC*, 625 F.2d at 827; *Navarro v. Gannon*, 385 F.2d 512, 518 (2d Cir. 1967), *cert. denied*, 390 U.S. 989, 88 S. Ct. 1184 (1968). However, Ackley and Cole have made no showing that they or any of their fellow

union members were denied the opportunity to express their views about the proposed collective bargaining agreement, or discouraged from asking questions about its provisions during the ratification meetings. Instead, they contend that nondisclosure of material information rendered their freedom of expression illusory. While Ackley and Cole may have had a claim for a violation of rights guaranteed them under the union constitution, and thus grounds for a section 301(a) breach of contract action, *see* discussion in Section C, *infra*, we find no basis for any claim of a violation of the LMRDA.

There are two recognized bases for establishing a union member's right to information under the LMRDA. First, the LMRDA specifies that union members are entitled to access to particular categories of information; a union's failure to provide that information to its members is actionable. *See, e.g.*, 29 U.S.C. §§ 412, 414 (1988). Second, two of our sister circuits, in considering appeals relating to membership votes required by the LMRDA, have held that unions must furnish sufficient information to allow members exercising a *statutory right to vote* to do so in a meaningful manner. *Blanchard v. Johnson*, 532 F.2d 1074, 1078-79 (6th Cir. 1976), *cert. denied*, 429 U.S. 834, 97 S. Ct. 100 (1976), and 429 U.S. 869, 97 S. Ct. 180 (1976); *Sheldon v. O'Callaghan*, 497 F.2d 1276, 1282 (2d Cir.), *cert. denied*, 419 U.S. 1090, 95 S. Ct. 681 (1974).[9] The case before us does not fall in either category.

[9]*Blanchard* involved a challenge to the manner in which a local union had conducted an affiliation referendum. The district court treated the vote as a union election, which is required by section 401 of the LMRDA, 29 U.S.C. § 481 (1988), and held that section 101(a) guaranteed union members the right to a meaningful vote in union elections. 532 F.2d at 1076. The Sixth Circuit did not disagree with this characterization. *Id.* at 1078. In *Sheldon*, the Second Circuit held that union members who opposed amendments to the union constitution were entitled to the opportunity to present their views to the membership. 497 F.2d at 1282. Because the vote was conducted by mail referendum and no meeting was held to discuss the amendments, the court held that the union was required to afford the dis-

[8] We note that even the first amendment does not contain a requirement that adequate information be provided to ensure that citizens will be enabled to cast enlightened or educated votes in public elections. However, we need not decide here whether we agree with our two sister circuits that meaningful information is necessary when the LMRDA requires that union members be permitted to vote on a particular subject, such as the election of officers.[10] As we have previously explained, "[a]lthough the LMRDA guarantees members the right to vote in union elections, it does not guarantee them the right to vote on" other questions not covered by the statute. *Stelling v. International Bhd. of Elec. Workers*, 587 F.2d 1379, 1385 (9th Cir. 1978), *cert. denied sub nom. Darby v. International Bhd. of Elec. Workers*, 442 U.S. 944, 99 S. Ct. 2890 (1979). Specifically, the LMRDA does not require that union members be given the opportunity to ratify collective bargaining agreements negotiated by their bargaining representatives. That right is provided, if at all, by the union's constitution or bylaws. *Alexander*, 624 F.2d at 1240; *Confederated Independent Unions v. Rockwell-Standard Co.*, 465 F.2d 1137, 1140 (3d Cir. 1972). Even if section 101(a) of the LMRDA is construed as including a full information requirement when membership votes are required by other provisions of the LMRDA, we see no justification for extend-

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senting members some other means of disseminating their views. *Id.* at 1282-83. There is no specific statutory right to ratify amendments to the union constitution; however, union constitutions, unlike collective bargaining agreements, contain many provisions that are specifically regulated by the LMRDA, including the assessment of dues and the election of officers.

[10]The *Blanchard* and *Sheldon* courts discussed the right to a "meaningful vote" in the context of section 101(a)(1). We do not understand how the language of this provision, which simply guarantees "equal rights and privileges" to all union members, can be read to include such a right. 29 U.S.C. § 411(a)(1) (1988). If such a right exists, and we do not decide this question here, a more likely source for that right than section 101(a)(1) is the broader guarantees of freedom of expression and participation contained in section 101(a)(2).

ing that rule to membership votes that, under the LMRDA, need not be conducted at all. It is the union's rules, not the LMRDA, that determine whether a contract ratification vote must be held. Therefore, it is the union's rules, not federal law, to which we must look when determining how the vote must be conducted, including any questions regarding what, if any, information must be afforded to union members during the contract ratification process. In short, it is the breach of the union's internal rules that must serve as the basis for any complaint that insufficient information was provided to the membership prior to or at the time of ratification of a contract. Section 101(a) of the LMRDA affords no remedy for such a breach.

C

Our decision today does not leave union members without rights in contract ratification cases, nor does it deprive them of a federal remedy for a union's failure to abide by the rules governing the ratification process. If the union's constitution or bylaws affords members the right to ratify a labor-management contract — and almost all do — that right is protected by federal law. However, the federal law that applies is of a different character than the LMRDA.

[9] Section 301(a) of the LMRA authorizes the federal courts to hear "[s]uits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations." 29 U.S.C. § 185(a) (1988). A union constitution is considered a contract between the union and its members, and a member or members may sue the union under section 301(a) for breach of that contract. *Wooddell v. International Bhd. of Elec. Workers*, ___ U.S. ___, 112 S. Ct. 494, 499 (1991); *United Ass'n of Journeymen v. Local 334*, 452 U.S. 615, 619-27, 101 S. Ct. 2546, 2549-53 (1981); *Kinney v. International Bhd. of Elec. Workers*, 669 F.2d 1222, 1229 (9th Cir. 1981). Unless union members allege a denial or infringement of a specific right provided them in the LMRDA, it is

this federal statutory remedy that they must pursue when they contend that rights guaranteed them by their union's constitution or bylaws have been infringed.[11] Here, although the Teamsters constitution provides a right to vote on contract ratification and the nature and extent of that right is subject to union regulation, Ackley and Cole failed to allege any violation of the union's rules and failed to plead any cause of action for such breach.

When union members allege a deprivation of rights guaranteed them by the union's constitution or bylaws, they must exhaust whatever internal remedies the union affords prior to bringing suit against the union. *Clayton v. International Union, UAW*, 451 U.S. 679, 688, 101 S. Ct. 2088, 2094-95 (1981) (exhaustion requirement applies to "disputes arising over *internal* union matters such as those involving the interpretation and application of a union constitution") (emphasis in original); *Buzzard v. Local Lodge 1040, Int'l Ass'n of Machinists*, 480 F.2d 35, 41 (9th Cir. 1973). Most, if not all, international union constitutions specify procedures for appeal to the international from adverse decisions by local union officials. Aggrieved members and unions alike benefit from exhaustion requirements, because such requirements encourage unions to regulate their own conduct. *Bise v. International Bhd. of Elec. Workers*, 618 F.2d 1299, 1303 (9th Cir. 1979), *cert. denied*, 449 U.S. 904, 101 S. Ct. 279 (1980). When a breach of the union constitution is alleged, an exhaustion requirement allows the international union to issue the authoritative interpretation of that document, as is its prerogative. The union is better equipped than the courts, for example, to

[11]As we have explained in Part IV, in some cases union members may also sue the union under section 301(a) of the LMRA, 29 U.S.C. § 185(a) (1988), for a breach of the duty of fair representation. *See Acri v. International Ass'n of Machinists*, 595 F. Supp. 326, 333-34 (N.D. Cal. 1983) (denying motion to amend pleadings to add a cause of action under section 101(a)(1) of the LMRDA), *aff'd*, 781 F.2d 1393 (9th Cir.), *cert. denied*, 479 U.S. 816, 107 S. Ct. 73 (1986). Ackley and Cole stated a claim for breach of that duty, but failed to establish a right to relief.

decide whether a constitutional provision for membership ratification of labor-management contracts requires that the membership be given advance notice of the terms of the proposed agreement, or whether a particular method of balloting should be used. The international's president or executive board can issue rulings and thereby establish a body of decisional law. If the internal procedures have been exhausted but a remedy has not been afforded for the alleged wrong, or if the court deems the union's internal procedures inadequate, *Bise*, 618 F.2d at 1303-04, then and only then may the aggrieved union member or members seek a remedy under section 301(a). Even then, courts considering section 301(a) suits will accord great deference to the union's interpretation of its own rules.

Congress's decision to leave the determination of whether and how contract ratification votes must be conducted to the unions reflects an understanding of the complexities of the contract negotiation process. Time is of the essence during contract negotiation and ratification; a few days may mean the difference between an amicable resolution of labor-management differences and a bitter and extended strike. Similarly, when a strike is in progress, if it cannot be ended by a quick ratification vote conducted immediately after a tentative agreement is reached, both sides may suffer serious and even irreparable economic injury — economic injury that both would desperately wish to avoid. Unlike other elections, a contract ratification vote cannot be scheduled in advance, or set for some pre-established date. No one knows until an agreement is reached whether or when negotiators will arrive at a contract. Because there may be an urgent need for speedy ratification, there may not be an opportunity for full argument on each of the provisions of the contract. In addition, ratification procedures must be tailored to the unique characteristics and needs of each union. Some unions span large geographic areas, while others are purely local in nature. The members of some unions work at fixed locations; in other unions, members spend a considerable amount of their working time on the

road or in the air. As a result of these and other differences, some groups of union members may prefer that the union hold ratification meetings, while others may opt for a mail balloting procedure. Neither of these procedures is ideal. Mail balloting may impede full debate on important issues, while an open meeting procedure may preclude the type of review of the entire contract that might otherwise be desirable. The individual unions are better suited than the courts to the task of determining what is best for their members — when and under what circumstances ratification votes are appropriate and what procedures are best suited to their members' needs and work schedules.

We do not mean the foregoing discussion to suggest in any way that union democracy is unimportant or that federal labor law accords unions virtually unlimited power to define internal policies and procedures by fiat. Rather, we believe that it demonstrates just the opposite. The legislative scheme established by Congress comprises three distinct, yet complementary, mechanisms designed to ensure the protection of the rights of union members and the democratic self-governance of unions by those members. The LMRDA establishes certain absolute principles to which all unions must adhere and affords certain fundamental rights to all union members; the LMRA provides union members with a means of holding their own union to the promises it has made and the procedures that it has created; and the LMRA also affords union members a right to sue their union for breach of its duty of fair representation. With respect to Congress's decision to leave the task of defining internal union procedures to unions in the first instance, that arrangement does not inhibit union democracy, but rather fosters it. " 'Democratic processes atrophy when they are not exercised; union members will have no interest in improving their organizations' internal adjustment procedures if they never are required to use them.' " *Wiglesworth v. Teamsters Local Union No. 592*, 552 F.2d 1027, 1031 (4th Cir. 1976) (quoting Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv.

L. Rev. 851, 869 (1960)), *cert. denied*, 431 U.S. 955, 97 S. Ct. 2676 (1977). Although union members must pursue their grievances though established channels, it is the union members who wield the ultimate power to shape union policies and procedures to their liking, through their statutorily guaranteed rights to elect union officials and to certify collective bargaining representatives.

[10] In summary, federal labor law provides a comprehensive remedial framework to address violations of rights guaranteed to union members by statute or by the union constitution or bylaws. Different procedures may be applicable depending on whether it is the former or the latter that is the source of the right at issue. Section 101(a) is only one part of the statutory framework. Congress did not intend that the section address every conceivable violation of union members' rights or authorize the federal courts to determine in every case what procedures best ensure union democracy. We will not read the provision in a manner that Congress clearly did not intend. Because Ackley and Cole do not allege any breach of the union's internal rules, we do not decide whether they have established such a breach and, if so, whether they are entitled to relief under section 301(a).

VI

[11] Although appellants' substantive claims are meritless, we find no basis in law for the district court's award of attorneys' fees to WCT and Local Union 692. Appellees contend that the award is firmly founded in the common benefit theory, which permits fee-shifting in cases where the litigation "confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.' " *Hall v. Cole*, 412 U.S. 1, 5, 93 S. Ct. 1943, 1946 (1973) (extending the common benefit theory to cases brought under the LMRDA) (quoting *Mills v. Electric Auto-Lite Co.*, 396

U.S. 375, 393-94, 90 S. Ct. 616, 626 (1970)). We strongly disagree. The rationale for a "common benefit" award is entirely inapplicable to cases in which a union defendant prevails against a member's or members' claim for relief under the LMRDA.

The common benefit theory permits successful individuals who have benefited fellow members of a class to compel those members to share the costs of obtaining the benefits they have received. In the ordinary common benefit case involving a union, reimbursement from the union treasury serves to shift the cost of litigation from the individual litigating member to the union's dues-paying membership as a whole. *Id.* at 8-9, 93 S. Ct. at 1948. The same is true with respect to other unsuccessful group defendants (or conceivably in some circumstances unsuccessful group plaintiffs). No fee-shifting is necessary, however, when a union successfully defends against a member's claim for relief under the LMRDA, because the dues-paying union members, who are the beneficiaries of the litigation, are already bearing the cost. Were plaintiffs to be assessed attorneys' fees, the costs would be shifted *away* from the common beneficiaries. Equally important, in our view, is the fact that the mere prospect of such an award would "chill union members in the exercise of their statutory right to sue the union." *Pawlak v. Greenawalt*, 628 F.2d 826, 831 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083, 101 S. Ct. 869 (1981). Congress' central purpose in enacting the LMRDA was to secure certain fundamental rights to union members and provide them with a remedy against their infringement. *United Steelworkers v. Sadlowski*, 457 U.S. 102, 109-11, 102 S. Ct. 2339, 2344-45 (1982). Extending the common benefit theory in the manner suggested by appellees would be contrary to this objective.

[12] Nor can the district court's award of attorneys' fees to WCT and Local Union 692 be justified on any other ground. In general, determination of the circumstances in which attorneys' fees may be awarded is the exclusive prerogative of

Congress. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-63, 95 S. Ct. 1612, 1623-24 (1975). A federal court may, however, award attorneys' fees not only when the common benefit exception applies but also when the case falls within one of the other two longstanding, judicially created exceptions to the general rule against fee-shifting: willful disobedience of a court order and bad faith or abusive litigation. *Id.* at 258-59, 95 S. Ct. at 1622. In the case before us, there is no allegation that Ackley and Cole willfully disobeyed a court order or acted in bad faith. "[T]he federal courts cannot, absent specific statutory authority or one of the three enumerated exceptions listed by the Supreme Court, alter the uniform system of cost-bearing created by Congress, or shift attorneys' fees merely because a party has lost a case or offended some legal norm." *Zambrano v. City of Tustin*, 885 F.2d 1473, 1481 (9th Cir. 1989) (footnote and citation omitted). The union defendants' request for attorneys' fees was not within the district court's authority to grant. Accordingly, the judgment of the district court is

AFFIRMED IN PART AND REVERSED IN PART.

Supreme Court, U.
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No. 91-1562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.,

Petitioner,

v.

KELLY MERK, et al.,

Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FEDERAL STATUTES INVOLVED

28 U.S.C. Sec. 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

29 U.S.C. Sec. 152(3)

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. Sec. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

Supreme Court Rule 10.1(a)(c)

Considerations Governing Review On Writ Of Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and

important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

No. 91-1562

IN THE

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881 ("Local 881" or "Union") herewith files its Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by Jewel Food Stores, a Division of Jewel Companies, Inc. ("Jewel").

COUNTER-STATEMENT OF THE CASE

Jewel has filed this Petition for a Writ of Certiorari naming both Kelly Merk, et al. ("Merk Respondents") and Local 881 as co-respondents.[1] As Jewel notes, this Petition seeks review of two decisions of the Seventh Circuit Court of Appeals. The first decision is reported at 848 F.2d 761 (7th Cir. 1988) ("*Merk I*") (Pet. Appendix A, pp. A-1 to A-13); the other is reported at 945 F.2d 889 (7th Cir. 1991) ("*Merk II*") (Pet. Appendix B, pp. B-1 to B-34). Only *Merk I* impacts on the Union and the duty of fair representation questions raised by Jewel.

Both *Merk I* and *Merk II* arose out of a grievance settlement between Jewel and Local 881. That grievance began in 1984 when Jewel cut employees' wages. Jewel claimed it acted pursuant to an oral agreement allowing it to make the wage cuts. Local 881 denied that any such agreement existed.

In addition to a grievance, Local 881 filed an unfair labor practice charge and a lawsuit to enforce its collective bargaining agreement. In June, 1985, Local 881 and Jewel entered into a settlement resolving the dispute between them. Under the terms of this settlement, Jewel agreed to restore wages to their pre-cut level and to provide retroactive back pay covering almost all of the losses suffered by the then active employees. Jewel offered noth-

[1] To avoid confusion, we note that the interests of Local 881 and the Merk Respondents are not aligned. The Merk Respondents were the plaintiffs below. Local 881 was a co-defendant with Jewel in *Merk I*. Therefore, Local 881 and the Merk Respondents are not truly co-respondents but, rather, are individual respondents to Jewel's Petition.

ing to those employees who left Jewel's employment between the initial wage cut and the effective date of the settlement. These employees constitute the class of Merk Respondents. Local 881 accepted the proposed settlement. The Merk Respondents thereafter filed suit claiming that Jewel had breached its collective bargaining agreement by cutting wages, and that the Union had violated its duty of fair representation by entering into a settlement that did not obtain compensation for the former employees.

In *Merk I*, the Seventh Circuit affirmed the district court's conclusion that the Union did not owe a duty of fair representation to the Merk Respondents since they had ceased to be employees of Jewel at the time of the grievance settlement. Inasmuch as the district court and the Seventh Circuit concluded that the Union did not owe a duty of fair representation to the Merk Respondents, Local 881 was dismissed as a defendant from this lawsuit. Thereafter, Jewel filed an interlocutory Petition for a Writ of Certiorari. This Court denied that Petition at 488 U.S. 956 (1988).

Since the Court of Appeals in *Merk I* affirmed the district court's dismissal of Local 881, it did not participate in the trial which subsequently took place between Jewel and the Merk Respondents. In its Statement of the Case, Jewel makes certain factual assertions which are based on findings at trial—a trial in which Local 881 did not participate. To the extent that Jewel's factual assertions rely on such findings, Local 881 does not adopt these factual claims and is not bound by them. 1B *Moore's Federal Practice*, Par. O. 405[1] (2d ed. 1984); Restatement (Second) of Judgments, Sec. 83(2)(d), comment (e)(1981).

Specifically Local 881 denies that there ever was an oral agreement between Local 881 and Jewel allowing Jewel

to engage in unilateral wage reductions. (Petition, p. 2) Local 881 denies that there was an agreement for an economic reopener. (*Id.*) Nor did Local 881 insist that any agreement contained in the collective bargaining agreement be left to an oral understanding. (*Id.*) Finally, Local 881 did not fail to disclose to its general membership the purported oral understanding which Jewel contends the parties reached and which Local 881 denies. (*Id.*)

Should this Court decide to reverse the decision in *Merk I* concerning the duty of fair representation, and to the extent that these facts are material to the outcome of any subsequent case against Local 881, Local 881 would insist on a new trial in order to exercise its right to present its position to a trier of fact.

SUMMARY OF THE ARGUMENT

The Union contends that this is not an appropriate case for a grant of a Writ of Certiorari because: (1) the Court of Appeals' decision in *Merk I* is narrowly tailored to the parties' arguments and litigation strategies which is unlikely to bind other parties or have a substantial effect on future cases. Consequently, the Court of Appeals in *Merk I* has not "decided an important question of federal law which has not been, but should be settled by this Court". S. Ct. R. 10.1(a). (2) The *Merk I* decision correctly held that the Union did not owe a duty of fair representation to the former employees—the Merk Respondents. Accordingly, the decision in *Merk I* is not in conflict with the applicable decisions of this Court or any other United States court of appeals. S. Ct. R. 10.1(a)(c).

REASONS FOR DENYING THE WRIT

I. INTRODUCTION.

Jewel seeks review of two decisions of the Seventh Circuit pursuant to 28 U.S.C. Sec. 1254(1). This Brief in Opposition to the Petition concerns itself only with the decision of the Court of Appeals in *Merk I* and, specifically, with the issue of whether the Union owed a duty of fair representation to the Merk Respondents who were former employees of Jewel and former members of the Respondent Union.

It is well established that this Court will not review a decision on certiorari as "a matter of right", but only as a matter of "judicial discretion" and for "special and important reasons." Sup. Ct. R. 10.1. The discretionary granting of certiorari enables this Court to effectively manage its docket and enormous case loads. This Petition should be denied because the decision of the Court of Appeals is neither in conflict with any decision of this Court or another court of appeals on the same matter, nor did the Court of Appeals decide "an important question of federal law which has not been, but should be, settled by this Court . . .". Sup. Ct. R. 10(a) and (c). On the contrary, the Seventh Circuit's decision in *Merk I* is extremely narrow and entirely consistent with this Court's "applicable decisions."

II. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW WILL HAVE LITTLE IF ANY APPLICATION OUTSIDE OF THIS CASE.

Jewel's Petition depicts the Court of Appeals' ruling in *Merk I* finding that the Union did not owe a duty to the

Merk Respondents as posing a significant threat to the stability of industrial relations and the system of exclusive representation. (Petition, p. 24) This characterization is a wild exaggeration of the Court of Appeals' limited opinion which was carefully tailored to the particular situation here. Specifically, the opinion explicitly rests on the parties' agreement that the Merk Respondents, as former employees, would *not* be considered "employees" under Section 2(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. Sec. 152(3). (*See* Pet. Appendix A, p. A-10) ("[w]e follow the parties' lead in assuming that the 2,000 former workers are not statutory 'employees'—without deciding whether this question would have had a different answer had the parties chosen a different litigating strategy.")

Similarly, the Court of Appeals found that the parties did not raise the issue of the Union voluntarily assuming a duty of fair representation and the former workers assenting to the Union's assumption of such a duty to represent them. (Pet. Appendix A, p. A-11 ("Again, however, the parties have not discussed whether the former employees assented to representation by the Union . . .".) *See* also Pet. Appendix A, p. A-13 ("Nonetheless, the parties' failure to make arguments that might have avoided this consequence leaves us with little choice.")

Jewel claims in its Petition that the Court of Appeals ". . . erroneously dismissed a claim alleging precisely such a violation". (Petition, p. 23) However, the Record does not support such an assertion. Jewel in its *Petition for Rehearing and Suggestion for Rehearing In Banc* to the Seventh Circuit and filed in 1986 after *Merk I* acknowledged that it had not previously raised such a claim. (The relevant parts of Jewel's Petition for Rehearing are attached hereto as Union Respondent Appendix A, hereinafter "Un. Resp. Appendix A"). There, Jewel claimed that it did raise the "assumption" and "assent" arguments:

> Finally, the panel indicated that perhaps if the parties had argued that the Union's authority to bind Plaintiffs was unrelated to the duty of fair representation, then the acknowledged disastrous consequences of its holding might have been avoided, and a different result reached.
>
> Jewel can only submit *that such an argument is simply a more general way of stating that which it did argue*; if the broader argument leads to one holding, the narrower argument cannot lead to a different holding. (emphasis supplied)

(Un. Resp. Appendix A, p. A-3)

As Jewel admits in the above passage, it considers the "assumption" and "assent" species of duty of fair representation matters to be identical to the more typical cases involving the duty of fair representation as an automatic consequence of exclusive representation. As the Court of Appeals in *Merk I* pointed out, however, these are separate doctrines. (Pet. Appendix A, pp. A-10 - 11, citing *Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790, 812-13 (1974); *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181, n. 20 (1971); *United Automobile Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1484 (6th Cir. 1983)).

Clearly, Jewel failed to raise this separate argument at the appropriate time. The *Merk I* court found that this precluded consideration of this separate argument on appeal. In this Petition, Jewel *does not* raise this conclusion as a separate error warranting review. Accordingly, Jewel has long since waived this argument.

The Court of Appeals expressly narrowed its holding by finding that its conclusions were a necessary product of the parties' litigation strategy. The precedential value of the decision below is thus, to say the least, extremely

limited. A decision that rests so entirely on various assumptions of law by the parties—and thus binds virtually no one other than the parties—is certainly not worthy of this Court's consideration.

III. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR ANY CIRCUIT COURT.

In deciding that the Union does not owe a duty of fair representation to the Merk Respondents, the Seventh Circuit properly relied on this Court's decision in *Pittsburgh Plate Glass* which established that Sec. 2(3) of the NLRA excluded retirees and other former workers from its definition of employees. (Pet. Appendix A, pp. A-10 - 11). The Court of Appeals found that the Merk Respondents lost their status as statutory "employees" when they quit Jewel's employment "for reasons other than a labor dispute or unfair labor practice" and, thereby, concluded, that, "[A] union need not represent non-employees." (Pet. Appendix A, p. A-10).

The Seventh Circuit's holding is perfectly consistent with *Pittsburgh Plate Glass* wherein this Court held that Section 2(3) of the NLRA, defining statutory "employees", includes only those who are actively employed. As this Court held:

> The Act, after all, as Section 1 makes clear, is concerned with the disruption to commerce that arises from interference with the organization and collective bargaining rights of 'workers'—not those who have retired from the work force. . . . Nowhere in the history of the National Labor Relations Act is there any evidence that retired workers are to be considered as within the ambit of the collective bargaining obligations of the statute.

> To the contrary, the legislative history of Section 2(3) itself indicates that the term "employee" is not to be stretched beyond its plain meaning embracing only those who work for another for hire.

404 U.S. at 166.

This Court's decision in *Pittsburgh Plate Glass* is grounded, as well, on Section 9(a) of the NLRA, 29 U.S.C. Sec. 159(a), which "accords representative status only to labor organizations selected by the majority of employees in a 'unit appropriate' 'for the purposes of collective bargaining'." 404 U.S. at 171. The Court concluded that retirees were not "employees" included in any bargaining unit and wrote:

> The unit determined by the Board to be appropriate was composed of "employees of the Employer's plant . . . working on hourly rates, including group leaders who work on hourly rates of pay . . ." Apart from whether retirees could be considered "employees" within this language, they obviously were not employees "working" or "who work" on hourly rates of pay. Although those terms may include persons on temporary or limited absence from work, such as employees on military duty, *it would utterly destroy the function of language to read them as embracing those whose work has ceased with no expectation of return.* (emphasis supplied)

404 U.S. at 172.

Section 9(a) of the NLRA has also been relied on by this Court in defining the scope of a union's duty of fair representation. Beginning with *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), this Court has consistently held that a union's exclusive grant of representation under Section 9(a) "is not absolute" and is tempered by a union's "honest effort to serve the interests of all of those **members**, without hostility to any." (emphasis supplied) Thus, this Court has concerned itself only with the union's obli-

gation and duty to represent "members" of a particular bargaining unit. This principle was later reaffirmed in *Vaca v. Sipes*, 386 U.S. 171 (1967) wherein this Court wrote:

> Under this doctrine, the exclusive agent's statutory authority to represent **all members of a designated unit** includes a statutory obligation to serve the interests of **all members** without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. (emphasis supplied)

386 U.S. at 177.

* * *

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a **member of the collective bargaining unit** is arbitrary, discriminatory, or in bad faith." (emphasis supplied)

386 U.S. at 190.

This same rationale was relied on in *Pittsburgh Plate Glass* wherein the Court wrote:

> Since retirees are not **members of the bargaining unit, the bargaining agent is under no statutory duty** to represent them in negotiations. . . . [T]he case obviously does not require a union affirmatively to represent nonbargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those it does represent. (emphasis supplied)

404 U.S. at 181, n. 20.

See also, *Anderson v. Alpha Portland Indus., Inc.*, 727 F.2d 177, 181 (8th Cir. 1984) ("[T]he union owes no duty of fair representation to retirees since the union's duty runs only to employees within the bargaining unit for whom it acts as the exclusive bargaining representative.")

Thus, this Court has consistently described the scope of the union's grant of exclusive representation and the concomitant duty of fair representation as extending only to bargaining unit members, and never as including former employees, or non-members of a bargaining unit. See, e.g., *Teamsters v. Terry*, 494 U.S. 558 (1990); *Electrical Workers v. Foust*, 442 U.S. 42 (1979); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

As *Pittsburgh Plate Glass*, *Vaca* and their progeny teach, the duty of fair representation does not last forever and does not extend to all persons, since it clearly does not reach retirees or other non-employees. Such a proposition is completely consistent with the rationale upon which this Court constructed the duty of fair representation doctrine. The duty of fair representation is the **quid pro quo** for the union's authority under Section 9(a) of the NLRA to exclusively represent bargaining unit members. *Humphrey v. Moore*, 375 U.S. 335, 342 (1964). Conversely, once an employee leaves the bargaining unit and the union ceases to have exclusive representational authority, the duty of fair representation must also end. Neither this nor any other court has ever held that either the power to act as exclusive representative nor the correlative duty to represent fairly, extends beyond Section 2(3) employees.

Jewel argues that the Union owes a duty to the Merk Respondents because, at the time the grievances arose, they "were subject to exclusive grievance and arbitration machinery established pursuant to the collective bargaining agreement." (Petition, pp. 20-21) Jewel's argument misses the point since Jewel focuses its analysis on the time the grievance arose. The issue of the existence of the duty of fair representation must focus on the relationship of the parties at the time of the alleged violation of the duty. As stated in *Airline Pilots Ass'n Int'l v. O'Neill*, 111 S.Ct. 1127 (1991):

> [A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so outside a 'wide range of reasonableness' *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), as to be irrational.

The same rationale for not affirmatively extending the Union's duty of fair representation to retirees applies to the Merk Respondents who voluntarily chose to sever their relationship from Jewel and the Union, even while the Union was attempting to enforce their contractual rights.

Once the Respondents voluntarily chose not to remain employees and bargaining unit members, the Union's status as exclusive representative and, therefore, the very foundation of the Union's duty of fair representation vanished. The Merk Respondents, in effect, stated that they no longer wanted the Union to represent them, no longer would pay dues and would no longer participate in union affairs such as contract ratification and the election of union officers. Their right to reject the Union through the NLRB's decertification process also ended. By virtue of their decision, the Merk Respondents removed themselves from the system of exclusive representation. They quite simply could no longer exercise their power to determine how the Union should function, or whether there should be any union at all. Conversely, the Union was no longer compelled by their power as members of the bargaining unit to shape the Union's decisions to conform to the former employees' interests.

Under these circumstances, to impose on the Union a duty of fair representation to the Merk Respondents would be unfair to both the Union and the former employees. The result would be that the Union would have to balance the interests of active employees against former employ-

ees even though the latter group has no ongoing interest in the bargaining relationship, cannot politically influence the Union, and cannot act to repudiate the Union should the Union's decisions not conform to the wishes of this group. Conversely, the former employees would be subject to the Union's decisions even though they no longer have any political or representational influence on the Union. This is the conflict which the district court herein sought to avoid. (Pet. Appendix C, p. C-8.)[2]

To accept Jewel's position would force unions into decisions that would be bad for both current and former bargaining unit members. This case represents a perfect example since Jewel presented the Union with the Hobson's choice of accepting a settlement favorable to current bargaining unit members but excluding former employees, or having no settlement at all. (Pet. Appendix C, p. C-4). Not surprisingly, the Union chose the former option. Now, Jewel wishes to have the Union exposed to liability because it followed the natural path of giving priority to the interests of those whom it was legally obligated to represent.

Pennsylvania Railroad Co. v. Day, 360 U.S. 548 (1959), the case primarily relied on by Jewel, is simply inapposite. That case concerned a question of whether the federal

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[2] The Union contends that, even should a duty of fair representation be found in this case, it did not violate the duty. To the contrary, Local 881 argues that nothing in duty of fair representation law prohibits a union from distinguishing between former and current employees when compromising a claim against an employer. See *Buchholzt v. Swift*, 609 F.2d 317, 325-27 (8th Cir. 1979); *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311 (7th Cir. 1986). See also *Steelworkers Local Union No. 2869*, 239 NLRB 982 (1978) (Union did not violate duty by obtaining grievance settlement benefitting only those who were active employees at the time of settlement).

courts or the National Railroad Adjustment Board had jurisdiction in an action under a collective bargaining agreement in the railroad industry. Although the plaintiff in *Day* was a former railroad employee, the jurisdictional issue did not depend in any way on the status of the plaintiff as a current or former employee. *Day*, 360 U.S. at 551-52. In contrast, here, the issue of whether a duty of fair representation exists has everything to do with whether an individual is a member of a bargaining unit or not.

Similarly, *Hines v. Anchor Motor Freight, supra.*, another case relied on by Jewel, is also a vastly different matter. That action concerned an employer's claim that the finality of the arbitration process immunized the employer against liability in a duty of fair representation case. Quite clearly, the issues in *Hines* had nothing whatsoever to do with the issue involved in the instant matter. There simply was no question in *Hines* as to whether the union owed a duty to the plaintiff. However, that is the threshold issue in our case.

Finally, Jewel relies on *Koshatka v. Philadelphia Newspaper, Inc.*, 762 F.2d 329 (3rd Cir. 1985) in support of its proposition that the Union assumed a duty to the Merk Respondents. The court in *Koshatka* emphasized that the plaintiff had voluntarily submitted his grievance to the union. As noted previously, the Court of Appeals in *Merk I* found that Jewel had not raised the assumption and assent argument. (Pet. Appendix A, p. A-11.) Jewel does not appeal from this aspect of the Court of Appeals' decision, nor does Jewel provide any record citation establishing that it did raise this argument at the appropriate time. Therefore, Jewel is precluded from relying on the *Koshatka* doctrine involving the assumption of a duty by a union which would otherwise not have one. Moreover,

Koshatka involved litigation over the inclusion in the bargaining unit of a **current** employee. This question is a far different one from the one raised by this case. Here, everyone agrees that the Merk Respondents were not employees at the time of the alleged breach.

In sum, the decision of the Court of Appeals in *Merk I* rests firmly on the applicable precedent established by this Court. It does not conflict with the decisions of any other circuit court. Jewel's Petition fails to lay the basis for a grant of a Writ of Certiorari.

CONCLUSION

For the reasons stated above, Respondent, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881, respectfully requests that this Court deny Jewel's Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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UNION RESPONDENT
APPENDIX A

In The
United States Court of Appeals
For the Seventh Circuit

No. 86-2723

KELLY MERK, et al.,

Plaintiffs-Appellees,

v.

JEWEL FOOD STORES, A Division of Jewel Companies, Inc.,

Defendant-Appellant,

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

Defendant-Appellee.

Appeal From The United States District Court For The Northern District of Illinois, Eastern Division

No. 85 C 7876

Honorable Marvin E. Aspen, Presiding

DEFENDANT-APPELLANT JEWEL FOOD STORES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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never before been thought sufficient to constitute a breach of the duty of fair representation.

Finally, the panel indicated that perhaps if the parties had argued that the Union's authority to bind Plaintiffs was unrelated to the duty of fair representation, then the acknowledged disastrous consequences of its holding might have been avoided, and a different result reached. (Slip. Op., p. 13)

Jewel can only submit that such an argument is simply a more general way of stating that which it did argue; if the broader argument leads to one holding, the narrower argument cannot lead to a different holding.

The Union did negotiate on behalf of Plaintiffs with respect to settlement of the grievance brought while they were employed; the settlement was intended by all concerned to bind them, and Plaintiffs never indicated to the contrary. Jewel argued that these facts precluded Plaintiffs from now bringing an individual lawsuit against the Company for breach of the labor contract.

If the Union had the authority to bind Plaintiffs even though it did not have a duty to represent them fairly, as apparently this panel would maintain, then the mere fact that Jewel argued that the Union did have a duty to conduct such representation fairly (and had complied with said duty), cannot lead to a different result.

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(4)

No. 91-1562

Supreme Court, U.S.
FILED
APR 20 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.,

Petitioner,

v.

KELLY MERK, et al.,

Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

INDIVIDUAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 91-1562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.,

Petitioner,

v.

KELLY MERK, et al.,

Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

INDIVIDUAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Jewel Food Stores is a grocery retailer in the Chicagoland area employing approximately 15,000 clerks, who are represented for labor relations purposes by Local 881 of the United Food and Commercial Workers' International Union. In September 1982, Jewel and the Union began negotiating for a new collective bargaining agreement (CBA) to replace the existing agreement. Those negotiations concluded with an agreement on January 27, 1983, which was reduced to writing, submitted to and ratified by the Union membership. The agreement contained fixed provisions over its 33-month term for the fundamental issues of wages and benefits. The agreement was to last until 1985.

On February 26, 1984, Jewel unilaterally implemented wage and benefit cuts to levels below those called for in the CBA. The Union protested to the NLRB and filed suit to compel arbitration of the dispute. Some 18 months later, the dispute was settled. The settlement provided for partial back pay and restoration of benefits, but at the insistence of Jewel, only those persons still employed by Jewel at that time were included in the settlement. The present individual Respondents represent the class of all the employees who suffered economic harm from Jewel's cuts and who were excluded from the settlement.

Jewel's wage cuts were implemented under a claim of right. Jewel claimed that, during the CBA negotiations, it was induced to drop its demand for a Favored Nations provision by the Union's promise to reopen the economic provisions of the CBA when Cub Foods, a warehouse-type competitor, entered the Chicago market. Jewel's negotiators claimed that, on the final day of negotiations, in a hallway conference, the local Union president offered

a full economic reopener, with both sides reserving the right to economic recourse, upon the entry of Cub into the market. The Union president's testimony regarding the hallway conversation was substantially contradictory: he claimed that he assured Jewel's representatives that the Union would be cooperative and would listen seriously in the event that Jewel experienced difficulties from competition by Cub, but that no reopener agreement was made. In any event, Jewel agreed to drop its demand for the Favored Nations provision.

There was no reference to this purported reopener in the CBA, the correspondence between Jewel and the Union setting forth areas of agreement outside the CBA, or internal Jewel memoranda. The only written reference to a reopener in the records contemporaneous to the negotiations was in the negotiating notes of the Jewel committee, some of which contained absolutely identical language although purporting to have been written by different individuals. In contrast, the Union notes makes no reference whatsoever to such an agreement.

In December 1983, Jewel contacted the Union, which resulted in a series of meetings being held. Jewel claimed those meetings were pursuant to the claimed reopener. The Union thought the meetings related to Jewel's request for a mid-term contract concession. Several of the meetings involved professionally produced presentations regarding the threat Jewel perceived from Cub Foods. Jewel's proposals for wage and benefit cuts were not accepted. On February 15, 1984, Jewel advised that it was presenting its final offer at impasse. Jewel had declared this impasse one day after the expiration of the 60 day "cooling off" period established under 29 U.S.C. § 158(a)(4). Implementation followed on February 26, 1984, without the consent of the Union. The Union litigated against

Jewel. Because these Respondents were not parties to the resolution of those proceedings, they independently filed this action.

Respondents original two count complaint was against both Jewel and Union Local 881. It was a hybrid action brought under section 301 of the Labor Management Relations Act (29 U.S.C. § 185). Respondents alleged that Jewel breached the CBA by reducing wages and benefits, and that the Union breached its duty of fair representation by failing to include Respondents in the settlement.

Respondents thereafter amended their complaint to plead a direct breach of contract count against Jewel. The District Court granted summary judgment in favor of the Union on the fair representation claim, holding that the Union had no duty of fair representation to former employees. *Merk v. Jewel Food Stores*, 641 F.Supp. 1024 (N.D. Ill. 1986). The Seventh Circuit affirmed on interlocutory appeal. *Merk v. Jewel Food Stores*, 848 F.2d 761 (7th Cir. 1988) (*Merk I*). This Court denied Jewel's petition for writ of certiorari from that decision. *Jewel Food Stores v. Merk*, 488 U.S. 956, 109 S.Ct. 393 (1988).

With the case now structured solely as a breach of contract action against Jewel, it proceeded to trial. The trial concluded in a jury verdict in favor of Jewel and against Respondents. Respondents thereafter took an appeal to the Seventh Circuit Court of Appeals, which ruled in favor of Respondents. *Merk v. Jewel Food Stores*, 945 F.2d 889 (7th Cir. 1991) (*Merk II*). The Seventh Circuit denied Jewel's petition for rehearing and suggestion for rehearing *en banc*. Jewel now files yet another interlocutory petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE IT RAISES NO ISSUES DEMANDING IMMEDIATE REVIEW BY THIS COURT.

When Jewel last sought this Court's grant of an interlocutory writ of certiorari in 1988, Respondents noted that the case presented a rare and unusual factual situation which did not warrant the Court's review. This Court agreed, and the petition for writ was denied.

Once again, Jewel comes before this Court on an interlocutory petition for writ of certiorari.[1] As this Court held in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967), where the Court of Appeals remands a case, it is generally not yet ripe for review by the Supreme Court, and the petition for writ of certiorari should be denied. See also *Denver v. New York Trust Co.*, 229 U.S. 123 (1913); *Estelle v. Gamble*, 429 U.S. 97, 114-115 (1977) (Stevens, J., dissenting). We urge application of this principle here to deny Jewel's writ.

Furthermore, Jewel's petition does not qualify this case for review under the principles set forth in Supreme Court

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[1] Footnote 1 of Jewel's petition seemingly suggests that the present petition comes from a final judgment. Yet, this cannot be true. In the decision from which Jewel seeks the writ, the Court of Appeals explicitly remanded the case "for further proceedings consistent with this opinion". *Merk II*, 945 F.2d 889, 899. Although Jewel correctly notes that the effect of the Court of Appeals' decision is final on the issue of Jewel's *liability* to Respondents, the issue of Respondents' *damages* remains unsettled, and judgment for a specific monetary amount remains to be entered in Respondents favor by the District Court upon remand.

Rule 10.1(a) or 10.1(c). As a result, denial of Jewel's petition is mandated.

A. The Issues Raised are not of Sufficient Importance to Warrant Review.

Jewel sets forth reasons which, it suggests, put this case within the scope of Supreme Court Rule 10.1(a) or (c). As we shall show, a careful analysis of the Court of Appeals decision demonstrates that Jewel has woefully failed to bring this case within the extremely narrow confines which warrant this Court's exercise of jurisdiction. While *Merk II* may have "exceptional economic importance" for the approximately 15,000 members of Respondents' class, it cannot be characterized as having "exceptional legal importance" on an issue of federal law so as to require resolution by this Court.

Consider that Jewel does not even attempt to argue that *Merk II* has significant precedential value of nationwide import. How will the Court of Appeals decision impact management or labor in a general way? How does the ruling on the validity of a particular secret oral side agreement to a unique CBA alter the fundamental nature and validity of such agreements throughout the land? Jewel does not even raise these questions, let alone answer them. The reasons are patent: the answers to those questions vitiate any contention that this case has significance outside of its own peculiar and unique facts.

The outcome of this case turned entirely upon what the Court of Appeals described as:

> "* * * a secret deal at an informal hallway meeting late in the evening of January 23, 1983. The precise terms of that deal are in dispute: Union officials claim that all they promised was to 'sit and discuss' Jewel's competitive position once Cub Foods entered the Chi-

> cago market whereas Jewel executives contend that they agreed to an 'economic reopener with full reservation of rights.' " *Merk II*, 945 F.2d at 891.

The lower court's decision turned upon the secret nature of the purported agreement between Jewel and Union executives. The Court of Appeals made clear that its decision did not alter Section 8(d) of the National Labor Relations Act (29 U.S.C. § 158(d)), nor did it mandate that all CBA's must be written to be enforced. (*Merk II*, 945 F.2d at 895). Instead, under these narrow and unusual facts, the court decried the mutual efforts of Jewel and Union executives to keep the oral reopener from the rank and file membership despite its paramount significance. Clearly, it was the clandestine nature of these activities, and not some fundamental shift in national labor law, that led to the outcome below.

The precedential value of *Merk II* is therefore inherently limited. While Jewel might desire the forum of this Court in a last effort to obtain a favorable ruling, Jewel's economic desires are insufficient to warrant this Court's exercise of jurisdiction.

B. The Court of Appeals Decision is not in Conflict with Prior Decisions of Other Courts of Appeals.

The crux of the Court of Appeals holding begins with the indisputable proposition that labor contracts are accorded a special status, since a CBA is the charter instrument of the system of industrial self-government. Inherent in the fundamental policies of national labor law is the goal of stability. The Court of Appeals addressed the stability issue:

> "To avert industrial strife, collective bargaining agreements must be more secure than garden variety contracts. Accordingly, we hold that national labor

> policy forbids introduction of prior or contemporaneous *secret* agreements to contradict fundamental terms of a ratified collective bargaining contract." (Emphasis added). *Merk II*, 945 F.2d at 894.

No issue is more likely to breed instability than an unexpected mid-term disruption of the fundamental terms of a CBA: wages and benefits. Nonetheless, based upon a purported secret deal that allegedly modified those fundamental terms, Jewel attempted to deprive all of its employees, including these Respondents, of those contracted-for rights. Nearly eight years of litigation against Jewel by several plaintiff groups in several fora resulted. Nearly all were successful in defeating Jewel's illegal conduct. But, Respondents were excluded from those successes. The Court of Appeals decision in *Merk II*, relying upon substantial prior precedent, assured that the last of that litigation would reach an equivalent conclusion.

The analysis in *Merk II* properly begins with a citation to *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945). Because the holding of that case directly and negatively affects Jewel's position, Jewel attempts to overcome it by incorrectly suggesting *Gatliff* has "vanished without a trace". (Petition at 6).[2] Yet, *Gatliff* is far from being in the dustbin of legal history to which Jewel would assign it. Several subsequent cases (which are wholly ignored by Jewel) demonstrate that, rather than being an archaic principle of law, *Gatliff* has continued viability. See *Lewart v. Woodhall Care Center Associates*, 549 F.Supp. 879 (S.D.N.Y. 1982); *Local 509 v. Annshire Garment Co.*, 65

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[2] Consider the majority's comment to a similar suggestion of the dissent in *Merk II*: "The dissent is unable to find any case which holds *contra* to *Gatliff Coal*. That is probably because the principles of fairness underlying *Gatliff Coal* are still central to the labor law of the land." *Merk II*, 945 F.2d at 899.

L.L.R.M. 2769 (1967); *Restaurant Employees v. Lawrys Rhodes*, 580 P.2d 611 (Wash. 1978). See also *Local 1574 v. Gulf and Western Manufacturing Co.*, 417 F.Supp. 191 (D.Me. 1976) (concurring opinion); *Lewis v. Lowry*, 295 F.2d 197 (4th Cir. 1961) (dissenting opinion).

Consider the 1986 NLRB decision in *N.D.K. Corp. v. United Food & Commercial Workers' Union*, 278 NLRB 1035. There, an employer suggested its repudiation of a CBA was justified by secret agreement purportedly made by a union agent. Rejecting the enforceability of secret deals, the NLRB held

> "In implementing [federal labor] policy, courts accord labor contracts a special, protected status and do not judge them by the general principles applicable to common law contracts. (Cites omitted; *Gatliff* included). * * * In light of these precedents, it is clear that [employer] may not hide behind its affirmative defenses to elude its obligations under the collective bargaining agreement. If the purposes of the Act are to be served, it is the parties' signed and facially valid collective bargaining agreement which warrants insulation from attack and the sham agreement which must be nullified. To reach any other result would not only undermine federal labor policy; it would work a disservice to the NDK employees, the very beneficiaries of that contract whose interests the Act was initially designed to protect."

As noted by the Court of Appeals in this case, these fundamental principles of fairness in *Gatliff* are still central to the labor law of the land.

Jewel urges upon this Court the proposition that the lower court's decision perverts settled national labor policy and upsets decades of prior precedent. In large part, Jewel's argument in premised upon the Ninth Circuit's decision in *Ackley v. Western Conference of Teamsters*,

____ F.2d ____ (9th Cir., February 21, 1992). But, an analysis of *Ackley* shows it to have no relevance here.

In *Ackley*, the plaintiffs were two employees of Matlack Inc., an interstate hauling company. Plaintiffs and their co-workers were members of certain locals of the Teamsters union. Prior to 1988, these workers were covered by a multi-employer CBA which was to expire in June 1988. In 1987, Matlack notified the Teamsters of its intent to withdraw from this arrangement and to bargain independently with the union. The NLRB determined that the local unions would constitute a single collective bargaining unit. The union negotiators, in an attempt to counter Matlack's efforts to split the bargaining unit, agreed not to release information about the terms and conditions of the agreement until it was ready for ratification.

Last minute notices of ratification meetings on a proposed agreement were given by the union's local leadership on three occasions. The plaintiffs, who both were union stewards, requested but were denied information about the proposed agreement terms, or were given general summaries only. On the third attempt, the proposed agreement was ratified.

The plaintiffs sued Matlack and the Teamsters, alleging that the union's failure to disclose certain material changes in the CBA before ratification violated the equal voting rights and freedom of speech provisions of Section 101(a)(1) (29 U.S.C. § 411), thereby invalidating the CBA. After trial, the district court dismissed the claim.

The *Ackley* decision on appeal noted that Section 101(a)(1) was an anti-discrimination provision. To state a claim thereunder, a union member must prove a denial of rights accorded to other members. Since, in that case, the evidence showed that all union members got the same type and

amount of information as the plaintiffs, a claim could not be stated. As to the plaintiffs' claim that the union's withholding of information violated the statute's guarantees of free speech and assembly, the court noted that the plaintiffs failed to show they were denied the opportunity to express their views about the CBA, or were discouraged from asking questions.

Nothing in the *Ackley* holding, or the *ratio decidendi* which supported the holding, conflicts with the Court of Appeals decision in *Merk II*. Yet, Jewel has the temerity to mislead this Court when its asserts that *Merk II* is "fundamentally at odds with the Ninth Circuit's approach in *Ackley*". (Petition at 14). The *dicta* which Jewel lifted from the *Ackley* decision (Petition at 8-9) relates only to the scope of Section 101(a)(1) of the LMRDA—a statute wholly irrelevant to the claims asserted here by Respondents. And, *Ackley*'s discussion of the information disparity between negotiators and the rank and file, while perhaps a realistic view of the ratification process, can in no way be viewed as a statement of federal labor policy favoring clandestine agreements which alter the fundamental terms of a CBA submitted to the rank and file for a vote. Yet, that is precisely the outcome for which Jewel submits the *Ackley dicta* here. *Ackley* simply does not address the issues presented to the Court of Appeals in *Merk II*. Hence, it does not conflict with *Merk II*. Thus, neither its holding nor its discussion can possibly warrant this Court's jurisdiction under Supreme Court Rule 10.1(a).

Jewel next incorrectly suggests that *Merk II* subjects ratified labor agreements to stricter scrutiny than "garden variety contracts". If this were the holding of *Merk II*, it purportedly conflicts with standards adopted by other courts of appeals. Yet, consider the case law Jewel cites. A review shows Jewel's argument is wrong.

In *Southeastern Pennsylvania Transportation Authority v. Brotherhood of Railroad Signalmen*, 882 F.2d 778 (3d Cir. 1989), the court held that it is appropriate for a district court to look beyond the face of a CBA when called upon to *interpret* a collective bargaining agreement. (Indeed, Jewel quotes the Third Circuit language in this regard). Our case does not involve the use of extrinsic evidence to *interpret* a CBA. Instead, as properly noted by the Court of Appeals in *Merk II*, our case involves an effort by an employer to effectively *overturn* the fundamental wage and benefits provisions of a CBA prior to that agreement's expiration, at substantial economic benefit to the employer and substantial economic detriment to the employees. And, Jewel's actions in this regard were entirely based upon a secret agreement. This is not a case in which the district court used the secret agreement to aid in its interpretation of an ambiguous provision of the CBA, to determine what was actually intended by the parties. This is a case in which the district court allowed the employer to rewrite the wages and benefits provisions of the CBA via the secret agreement. The Court of Appeals in *Merk II* properly prohibited such a result, as a matter of fundamental national labor policy first espoused in *Gatliff*.

For similar reasons, Jewel's citations to *International Union v. Racho Trucking Co.*, 897 F.2d 1248 (3d Cir. 1990); *Manville Forest Products Corp. v. United Paperworkers International Union*, 831 F.2d 72 (5th Cir. 1987); *Sepulveda v. Pacific Maritime Association*, 878 F.2d 1137 (9th Cir. 1989); *International Brotherhood of Electrical Workers v. Southern California Edison Co.*, 880 F.2d 104 (9th Cir. 1989); and *United Mine Workers v. Bituminous Coal Operators' Association, Inc.*, 898 F.2d 177 (D.C. Cir. 1990), are unavailing to establish the necessary conflict under Supreme Court Rule 10.1(a). Each of these cases

involves circumstances in which extrinsic evidence was used to *interpret* ambiguous terms of a collective bargaining agreement. As we have already noted, here Jewel was improperly allowed to introduce evidence of a clandestine side agreement to justify its refusal to honor the stated wage and benefits terms of the CBA. *Merk II* rightfully prohibits this result.

Jewel suggests that the Court of Appeals decision is in conflict with a prior ruling of the Seventh Circuit, *Mohr v. Metro East Manufacturing Co.*, 711 F.2d 69 (7th Cir. 1983). Yet, the Court of Appeals answered Jewel's contention in its opinion:

> "Ignoring this long line of precedent, however, the district court allowed introduction of the oral reopener to vary the terms of the written CBA. The district court relied upon *Mohr v. Metro East Mfg. Co.*, 711 F.2d 69, to buttress its holding. But our decision is not inconsistent with *Mohr*, which held only that the parol evidence rule does not prevent an individual employer from modifying an industry-wide collective bargaining agreement reached between an employers association and an international union by means of oral agreements with the union local. As the *Mohr* court observed:
>
> > The agreement between the association and the international union was deliberately left incomplete in recognition of the diversity of circumstances to which it had to apply, thus allowing individual employers and their local unions to add to the provisions, whether by supplemental written agreements, or oral agreements, or as in this case by both sorts.
>
> *Id.* at 72-73. Unlike the case at bar, the oral agreement in *Mohr* was not kept hidden from the Union membership. It dealt, moreover, with a purely peripheral matter regarding the terms of employment for schoolboys. Therefore, parol evidence was admissible

> in *Mohr* to supplement the general terms of the industry-wide collective bargaining agreement and to adapt them to local conditions." *Merk II*, 945 F.2d at 895.[3]

In summary, *Merk II* does not conflict with decisions from other courts of appeals on the issues presented. Jurisdiction under Rule 10.1(a) has therefore not been established.

C. The Court of Appeals Decision Does Not Conflict With Prior Decisions of This Court.

Jewel's next suggestion is that the decision in *Merk II* conflicts with purportedly analogous decisions of this Court, so as to create jurisdiction under Rule 10.1(c). Once again, Jewel's argument fails. Indeed, it is based upon an erroneous misreading of the cited cases.

On page 7 of its Petition, Jewel suggests that *Merk II* violates what Jewel describes as a directive of this Court found in *United Paperworkers International Union v. Misco Inc.*, 484 U.S. 29, 108 S.Ct. 364 (1987). In particular, Jewel suggests that *Misco* stands for the proposition that:

> "* * * considerations of public policy may preclude enforcement of collective bargaining agreements *only* where the contract would violate:
>
> > 'Some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest' ". (Petition at 7).

---

[3] It is also interesting to note that the "long line of precedent" to which *Merk II* referred are those cases we cited above which demonstrate that Jewel is flatly wrong in suggesting that *Gatliff Coal Co. v. Cox* "vanished without a trace".

Yet, in no way does *Misco* stand for this proposition. In that case, this Court discussed the policy behind insulating a labor-management arbitration decision from judicial review. The language of *Misco* which Jewel recites relates to the narrow question of when a court can refuse to enforce an *arbitrator's award* under a CBA as being contrary to public policy. The entire quote of this Court, which Jewel conveniently fails to recite, states:

> "We caution, however, that a court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant and is to be ascertained by reference to the laws and legal precedents and not from the general considerations of supposed public interest.' " *Misco*, 484 U.S. at 43.

Significantly, the case upon which this Court relied in *Misco*, *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), also involved an arbitrator's award of back pay damages, and whether that award was unenforceable based upon a public policy argument. Both *Misco* and *W.R. Grace* are inapplicable to our case. Our case does not involve an arbitrator's decision, but instead involves a truly significant question of whether national labor policy will allow an employer to subvert the fundamental terms of a collective bargaining agreement, an agreement submitted to and ratified by the rank and file, based upon a secret side agreement. *Merk II* in no way conflicts with this Court's decisions in *Misco* and *W.R. Grace*.

Jewel's next argument is that *Merk II* ignores what Jewel characterizes as this Court's admonitions against *ad hoc* government interference with the NLRA's private bargaining system. In support of this position, Jewel cites *H.K. Porter Co. v. National Labor Relations Board*, 397 U.S. 99 (1970).

That case involved an examination of whether the National Labor Relations Board has the power to remedy an employer's alleged unfair labor practice by refusing to agree to "check off" the union dues of workers from their paychecks. This Court held that the Board did have such remedial powers, but that the Board was without the power to compel an employer or union to agree to any particular substantive contractual provision in a CBA. This Court supported that holding by reviewing the historical background of legislative enactments concerning labor-management activities. As part of that analysis, this Court made a statement Jewel quotes on page 7 of its Petition.[4] Here, at no time did Respondents seek, nor did the Court of Appeals involve itself in, dealings between the Union and Jewel as a "party to the negotiations". Instead, as is apparent from the holding of the Court of Appeals in *Merk II*, Respondents simply sought their legal remedies when, without justification, Jewel unilaterally violated the wage and benefit provisions of a ratified CBA, relying upon a theretofore undisclosed and surreptitious side deal.

This is not the type of governmental interference in the labor-management relationship which this Court decried in *H.K. Porter*. This is, by contrast, a proper resort to the judicial forum which exists to resolve such disputes. *Merk II* simply serves to implement a fundamental precept of national labor policy by precluding destabilization of settled collective bargaining agreements through undisclosed, unratified secret deals.

Jewel's Petition is replete with language lifted from various decisions of this Court, and the various Courts

---

[4] "[I]t was never intended that the Government would * * * step in, become a party to the negotiations and impose its own views of a desirable settlement."

of Appeals which, out of context, might seem superficially supportive of Jewel's position. Yet, a careful reading of each case as to the specific facts, the entirety of the court's holding, and the context in which that language is found uniformly demonstrates that those cases do not support Jewel's position, let alone warrant this Court's acceptance of this case. *Merk II* conflicts neither with prior cases of other Courts of Appeals, nor with earlier decisions of this Court.

Jewel next suggests that *Merk II* will somehow require employers to monitor the ratification process before they can rely upon the provisions of a CBA. This simply is not so. As was eloquently stated by the Court of Appeals in *Merk II*:

> "Had the CBA embodied the entire agreement between the parties, this case would have been easily resolved. But the outcome of negotiations was not so straightforward." *Merk II*, 945 F.2d at 891.
>
> * * *
>
> "Yet Jewel and the Union explicitly collaborated to keep the oral reopener hidden from the rank and file membership despite its paramount significance. Thus Union members who reasonably believe that they were guaranteed a fixed rate of pay for duration of the CBA unexpectedly found their wages slashed at mid-term. Under these circumstances, enforcement of an oral reopener that was concealed and was held from ratification by the membership is certainly in derogation of national labor policy." *Merk II*, 945 F.2d at 896.

Distilled to its most simplistic statement, the Court of Appeals says nothing more than "if it is fundamental, and if it is secret, then you cannot rely upon it". The fact that the reopener was kept secret from the Union rank and file until February 26, 1984, when Jewel unilaterally implemented wage and benefit cuts to levels below those

called for in the CBA, the fact that the Union rank and file ratified what they perceived to be a wage and benefits contract fixed for a 33-month period, and the fact that Jewel engaged in active collusion with the Union in withholding the clandestine agreement from the rank and file are all critical facts which supported the Court of Appeals decision. Based upon the previously adopted rule announced in *Texaco v. NLRB*, 722 F.2d 1226 (5th Cir. 1984); *Meyerson v. Contracting Plumbers Association*, 606 F.Supp. 282 (S.D.N.Y. 1985); and *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747 (3d Cir. 1978), *Merk II* was properly decided.

On pages 9-12 of its Petition, Jewel cites several cases which allegedly conflict with *Merk II* relative to an employer's right to involve itself with the ratification process. In fact, no such conflict exists. None of the cases cited by Jewel involve circumstances where an employer sought to enforce an unratified *secret* agreement going to the very essence of a CBA (wages and benefits). That critical distinction sets this case apart. The policy of labor law must, as held by the Court of Appeals, seek to protect the rank and file from unscrupulous and collusive deals. Jewel asserts that it was powerless to require or insure ratification, lest it commit an unfair labor practice. However, the applicable labor statutes were never intended by Congress to provide a shield behind which an employer could hide its participation in illicit conduct. That is precisely the outcome Jewel seeks. *Merk II* properly prohibits this result.

After *Merk II*, a union may still enter into an agreement that it believes to be in the best, long term collective interests of its members, although that agreement might not enjoy their immediate, widespread support. The only proscription created by *Merk II* is against efforts to

rewrite the fundamental terms of a ratified CBA pursuant to a secret collusive deal. Contrary to Jewel's arguments, *Merk II* did not destroy "critical contract rights" held by Jewel.[5] As a matter of fundamental labor law, no right existed in Jewel in the first instance to void the fundamental terms of the CBA. Since that right never came into existence, no right was lost when Jewel's attempt to violate Respondents' economic rights was turned aside.

As its closing argument on the "reopener" issue, Jewel abandons its role as a principal player in the collusive deal, arguing that it was only a "bystander" while the Union was a "prime mover". (Petition at 17). The facts of this case demonstrate otherwise, as noted by the Court of Appeals. As an essential tenet of federal labor policy, the rights of *all* parties to the fundamental provisions of a collective bargaining agreement are upheld, and secret side deals affecting those fundamental terms are held unenforceable. The decision of the Court of Appeals was correct. That decision conflicts in no way either with the prior precedent of this Court, or with decisions of other Courts of Appeals. This Court's review of this matter is unwarranted. We respectfully urge this Court to decline to exercise jurisdiction over this matter.

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[5] It is interesting to note Jewel's suggestion that the secret "reopener" was a critical part of the CBA (Petition at 13). In the next breath, Jewel says that the secret deal did not contradict or change any conditions of employment. We wonder what comments Jewel's executives (or the attorneys representing Jewel) would make if they were advised in writing that Jewel would pay them a fixed amount of wages and benefits over an established term, only to have those wages and benefits dramatically and unilaterally reduced mid-term by Jewel without prior notice? The cavalier attitude reflected in Jewel's argument here is reflective of the posture Jewel has taken toward the rights of Respondents' class members going back to 1983.

II.

THE COURT OF APPEALS ACTED WITHIN ITS AUTHORITY BY OVERTURNING THE JURY'S VERDICT.

Only a brief response need be made to Argument III found on pages 17-19 of Jewel's Petition. Basing its contention on FRCP 50(a)(1), Jewel suggests that the Court of Appeals improperly failed to evaluate whether evidence existed to support the jury's finding that the reopener was enforceable. What Jewel fails to acknowledge is that the question of the enforceability of the reopener was not one for the trier of fact. Rather, as properly held by the Court of Appeals, the enforceability of the clandestine side deal was an issue of law for the court to decide in the first instance. Under the holding in *Merk II*, such secret deals will not serve to exculpate an employer from its breach of the clear and specific wage and benefits provisions of a CBA. If, as ruled by the Court of Appeals, evidence concerning the "reopener" was inadmissible, it matters not whether the jury thought the agreement was enforceable. As a matter of law, it could not be. Hence, the jury should never have decided the issue. And, since Jewel's only defense to Respondents' breach of contract claim was based upon the secret deal, the Court of Appeals properly rendered judgment on the liability issue in favor of Respondents.

III.

THE DECISION IN *MERK I* REGARDING THE UNION'S DUTY OF FAIR REPRESENTATION DOES NOT CONFLICT WITH PRIOR PRECEDENT.

At the outset, this Court should note that this is Jewel's second "bite at the apple" on this issue. The primary issue addressed to this Court by Jewel in its earlier petition for writ (*Jewel Food Stores v. Merk*, No. 88-523, October

1988 Term), was identical in all relevant respects to Issue IV of Jewel's present Petition. This Court properly denied Jewel's earlier petition; the advancing age of Jewel's argument has not given it any greater merit.

Jewel once again contends that *Merk I* conflicts with previous decisions of this Court which foster an exclusive mechanism for resolving disputes arising under a CBA. Jewel contends that since a grievance arose here under the CBA, its contractual enforcement procedures must control. However, this Court has never held that aggrieved employees must be limited to the contractual grievance procedures in all situations. To the contrary, this Court has frequently identified situations in which individuals with rights created under a CBA may proceed individually to vindicate their claims against a recalcitrant employer.

For example, *Vaca v. Sipes*, 386 U.S. 171, 185 (1967), excuses the obligation to employ union remedies in situations where the employer repudiates the contractual arbitration procedures. In *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 330 (1969), this Court held that an employee may proceed directly against his employer when the effort to proceed with formal contractual or administrative remedies would be futile. In *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), this Court held that employee benefit fund trustees need not utilize the arbitration procedures contained in the CBA to enforce their rights under the agreement. These cases make clear that the preference for private dispute resolution is far from an absolute rule. Courts may, in appropriate circumstances, permit direct actions by aggrieved individuals for enforcement of a CBA. This Court has frequently held that the preference for union-mediated grievance and arbitration procedures will be put aside in those circumstances where reliance upon such procedures is not appropriate.

This is such a case. As we shall show, the position in which Respondents found themselves (as former employees) put them in a direct conflict in fact with the interests of the ongoing Union rank and file. Under such circumstances, the preferred route of union-mediated dispute resolution was not available to protect Respondents' interests.

A proper understanding of *Merk I* rests on a review of *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971). *Pittsburgh Plate Glass* holds that the statutory definition of "employee" found in NLRA Section 2(3) (29 U.S.C. §152(3)) may not be separated from those rights guaranteed under Section 7 of the Act, particularly the right to bargain collectively in an appropriate unit. In seeking to determine whether retirees fit within the statutory definition of "employee", this Court reaffirmed that "in doubtful cases resort must still be had to economic and policy considerations to infuse Section 2(3) with meaning." 404 U.S. at 168. Looking to the policies underlying the Act, *Pittsburgh Plate Glass* established that the statutory definition of "employee" necessarily includes a community of interest analysis.

The essence of this analysis is the recognition that retirees' interests are inherently in conflict with the interests of active employees. As a result of this conflict, they may not be properly included within the collective bargaining unit with active employees. 404 U.S. 173. Inherent in the definition of "employee" under the NLRA is the notion that employees share common interests and goals and therefore may act together to bargain collectively or take other concerted action utilizing their economic weapons and advancing their economic interests. "The term 'employee' must be understood with reference to the purpose of the act and the facts involved in the economic relationship." 404 U.S. at 167.

Merk I and the District Court ruling which preceded it exclude Respondents from the definition of "employee" because Respondents lack the common interests and goals which the Act seeks to foster and protect. The retirees in *Pittsburgh Plate Glass* were not excluded from the definition of "employee" solely because they were no longer working. Importantly, as retirees, they lacked a community of interests with active workers sufficient to justify their inclusion in a common bargaining unit. The statutory definition of "employee" necessarily incorporates the notion of common interests. Where those interests materially diverge, appropriate individuals must be excluded from the bargaining unit.

A similar conclusion derives from the analytic framework developed in *Schneider*. There, this Court reasoned that the presumption of arbitrability (which *Republic Steel v. Maddox*, 379 U.S. 650 (1965), makes clear is intertwined with the union's duty of fair representation) is designed to further the national labor policy of peaceful resolution of labor disputes by requiring the parties to forego the economic weapons of strikes and lockouts. This Court refused to apply that presumption in the context of enforcing the terms of a collective bargaining agreement when the party seeking to enforce the agreement had no recourse to economic weapons.

> "Arbitration promotes labor peace because it requires the parties to forego the economic weapons of strikes and lockouts. Because the trustees of employee benefit funds have no recourse to either of those weapons, requiring them to arbitrate disputes with the employer would promote labor peace only indirectly, if at all." 466 U.S. at 372.

Respondents here, like the retirees in *Pittsburgh Plate Glass*, have a narrow, single interest materially different from the rank and file represented by the Union in the

1985 settlement. They are a "functionally distinct minority", 404 U.S. at 172, interested solely in obtaining lost wages and benefits. The District Court here repeatedly emphasized the profound and inherent conflict which the Union faced in representing both active and former employees. *Merk v. Jewel Food Stores*, 641 F.Supp. 1024 (N.D. Ill. 1986). Respondents, like the trustees in *Schneider*, had no recourse to economic weapons. They are neither members of the Union nor employees of Jewel. While active members might reasonably forego the lost wages resulting from Jewel's unilateral wage and benefit cuts in exchange for more wages, benefits or job security in the future, Respondents had nothing to trade. They had no economic weapons at their disposal and so posed no threat to labor peace. Respondents' economic weakness undermines the logic supporting exclusive reliance on union-mediated grievance resolution. In the absence of this logic, there is no basis to mandate union-mediated procedures as the sole remedy. A direct action should be allowed.

The interaction of *Pittsburgh Plate Glass* and *Schneider* was carefully analyzed by the court in *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985), *cert. denied*, 471 U.S. 1102 (1985). The *Anderson* court concluded that retirees need not exhaust union-mediated contract grievance procedures and could pursue a direct action against the employer for breach of the collective bargaining agreement. The court analyzed the position of retirees to determine whether they had more in common with the trustees considered by the *Schneider* court or with active employees. The court followed the analysis used in *Pittsburgh Plate Glass* to conclude that retirees' interests often conflicted with those of active workers and that retirees have no recourse to economic weapons. Therefore, the court followed the lead of *Schneider* to determine that the presumption of arbitrability was not applicable.

The defendant in *Anderson*, like Jewel here, contended that *Maddox* and its progeny required union-mediated arbitration. The court rejected this contention:

> "The cases cited by Alpha do not justify letting a union mediate the interests of a 'functionally distinct minority' which can not be made part of the bargaining unit and which, as the Supreme Court pointed out, does not have a vote in union affairs." 752 F.2d at 1297.

The *Anderson* court properly concluded, like the lower courts here, that *Maddox* and its progeny are not applicable where there is a significant conflict between the interests of CBA beneficiaries. The *Anderson* analysis buttresses the lower court decisions in the present case as logical and appropriate extensions of the analysis used by this Court to define the scope and extent of a union's right and duty of exclusive representation. In this rare case where a functionally distinct minority of individuals exists, with a narrow interest in sharp conflict with the majority interests, the presumption in favor of exclusive representation must give way to the individual employees' ability to pursue a direct remedy against an employer who has breached the collective bargaining agreement. The District Court's holding that the right of exclusive representation and its correlative duty of fair representation are vitiated only when the plaintiffs are both ex-employees *and* have a serious conflict between their narrow interests and broader interests of active employees does not contradict the holdings of this Court or violate federal labor policy.[6]

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[6] This Court's decision in *Pennsylvania Railroad Co. v. Day*, 360 U.S. 548 (1959) does not require a contrary holding. *Day*, decided under the Railway Labor Act of 1934 (45 U.S.C. §151) involved the compensation claims of a single locomotive engineer, brought

(Footnote continued on following page)

Jewel cavalierly attempts to avoid this inherent logic by arguing that Respondents' rights under the CBA grievance/arbitration provisions were not diminished upon Respondents' separation from Jewel. The economic decisions reached by the Union when it settled with Jewel, which led to this suit, demonstrate the fallacy of this contention. Far from being protected by the Union, Respondents were cast adrift, and are the only members of the class of Jewel employees in 1983-85 who have yet to receive the full benefit of contractually established wages and benefits.

In summary, Jewel's reiteration of this question in this second petition for writ fails to bring this case within the ambit of this Court's jurisdiction. We respectfully submit that the Petition should be denied.

IV.

THE COURT OF APPEALS CHOICE OF A FIVE-YEAR STATUTE OF LIMITATIONS FOR THIS CLAIM WAS APPROPRIATE.

The District Court held that Respondents' breach of contract action against Jewel was timely, applying the Illinois

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[6] *continued*

pursuant to the explicit terms of a CBA. The case did not involve an employer-union dispute over the validity of a CBA provision, as here, nor did it involve a conflict of interest between that plaintiff and other groups of employees. The sole issue was whether the retired engineer, dissatisfied with the decision of the National Railroad Adjustment Board on the same issue raised by others which was dispositive to his claim, could independently pursue a suit in court. This Court's decision that the retired engineer was bound by the Board's decision in no way establishes that Respondents here, in entirely dissimilar circumstances, are limited to the grievance/arbitration settlement the Union reached on behalf of active employees.

five year statute of limitations pertaining to oral contracts. In a thorough analysis of the Supreme Court decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the District Court concluded that application of the most analogous state statute was appropriate since Respondents' direct action against Jewel did not involve those "consensual processes that the federal labor law is chiefly designed to promote". *Merk v. Jewel Food Stores*, 641 F.Supp. 1024, 1035 (N.D. Ill. 1986). The District Court held that federal labor law would not be frustrated by application of the most analogous state statute of limitations.

Merk I did not directly address this issue, commenting favorably upon the District Court's holding only in a footnote. *Merk I*, 848 F.2d at 762, n. 2. Yet, importantly, *Merk I* noted that its then-recent decision in *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986), supported the District Court. Although it chose not to present this issue in its last interlocutory petition for writ of certiorari, Jewel has elected to address the question now.

In *DelCostello*, this Court adopted the six month statute of limitations found in § 10(b) of the NLRA (29 U.S.C. § 160(b)) in hybrid suits against an employer and union for breach of the duty of fair representation. However, this Court clearly stated it was not departing from the settled federal policy of borrowing the most analogous state statute:

> "We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal court should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. (Citations omitted). On the con-

> trary, as the courts have often discovered, there is not always an obvious state law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods." 462 U.S. 171, 172.

DelCostello reaffirmed the holding in *Autoworkers v. Hoosier Cardinal*, 462 U.S. 151 (1983), that a straightforward breach of contract action under § 301 should apply the six year Indiana limitations period for unwritten contracts. This Court stated:

> "We held [in *Hoosier*] that the suit was governed by Indiana's six-year limitations period for actions on unwritten contract; we resisted the suggestion that we establish some uniform federal period. Although we recognized that 'the subject matter § 301 is 'peculiarly on that calls for uniform law,' (citations omitted) we reasoned that national uniformity is of less importance when the case does not involve 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it.' (Citations omitted). We also relied heavily on the obvious and close analogy between this variety of § 301 suit and an ordinary breach of contract case. We expressly reserved the question whether we would apply state law to § 301 actions where the analogy was less direst or the relevant policy factors different:
>
> > The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law." 462 U.S. at 162, 163.

DelCostello clearly distinguished a straightforward suit for breach of contract under § 301 from a hybrid suit, finding that the federal labor policy which compels application of a shorter limitations period in a hybrid action would

not be present in a straightforward breach of contract suit.

> "The suit is thus not a straightforward breach of contract suit under § 301, as was *Hoosier*, but a hybrid § 301/fair representation claim, amounting to a 'direct challenge to 'the private settlement of disputes under [the collective-bargaining agreement]." (Citations omitted). Also unlike the claim in *Hoosier*, it has no close analogy in ordinary state law." 462 U.S. at 165.

Jewel suggests our case constitutes an attack on the negotiation process, and not on Jewel's breach of the CBA, in an attempt to distinguish *DelCostello*. This contention has no merit. Respondents charged Jewel with violating the fundamental provisions of the CBA. Jewel defended by relying on the clandestine "reopener" agreement. Respondents challenged the legal validity of Jewel's defense, and ultimately won in the Court of Appeals. The negotiating *process* leading to the CBA, or to the supposed side deal, was never attacked by Respondents. Instead, Respondents only attacked Jewel's legal right to justify the CBA breach with the secret deal.

This case falls squarely within the *DelCostello* holding. The District Court's application of Illinois' five year limitations period, approved by the Court of Appeals in *Merk I*, was proper. Jewel has shown no reason for this Court to grant an interlocutory petition for writ under Rule 10.1 on this issue, which Jewel did not even deem worthy of asserting the last time it was before this Court.

CONCLUSION

For all of these reasons, Jewel has failed to show that this case warrants this Court's exercise of its jurisdiction. We respectfully urge this Court to deny this interlocutory petition, so as to allow this case to be remanded to the District Court for resolution of the remaining outstanding issue of Respondents' proper damages.

Respectfully submitted,

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No. 91-1562

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In The
Supreme Court of the United States
October Term, 1991

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.
Petitioner,

v.

KELLY MERK, et al.,
Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,
Respondents.

Petition For Writ of Certiorari
To the United States Court of Appeals
For The Seventh Circuit

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No. 91-1562

In The
Supreme Court of the United States
October Term, 1991

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.
Petitioner,

v.

KELLY MERK, et al.,
Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,
Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF OF PETITIONER

Petitioner replies herein to the two briefs filed by the Individual Respondents and the Union Respondents. Unless otherwise indicated, references to "Respondents" will mean "Individual Respondents."

1. It is necessary to correct some of the factual misstatements and unwarranted assumptions in the Respondents'

Brief.[1] Respondents state (p. 1) that the January 27, 1983 agreement "was reduced to writing." What the jury found (and the Seventh Circuit agreed in *Merk II* (Pet. App. at B-7)), was that "the parties did not intend the written terms of the CBA to embody their entire agreement." Thus, rather than seeking to enforce "the agreement" actually reached by Jewel and Local 881, Respondents seek to impose on Jewel a substantially different one.

2. Respondents state (p. 1) that only Jewel's then-current employees "were included in the settlement". In fact, the settlement covered all current and former employees but provided that only current employees should get backpay. Stip. Uncon. Facts, ¶¶ 51, 52.

3. Respondents seek to obscure the outcome of prior proceedings by persistently referring to the oral reopener as a "purported" agreement. (p. 2). Such references ignore that the jury found that Local 881 had orally agreed to a contingent reopener – a factual finding not disturbed on appeal. The Seventh Circuit acknowledged in *Merk II* that "it was proper for the jury to resolve the additional factual question of the precise terms of the oral promise." (Pet. App. at B-7).

4. Respondents are disingenuous in asserting (p. 2) that the Jewel negotiators' notes are the only contemporaneous written references to the reopener. The record includes Local 881 negotiators' notes that became fragmentary or broke off precisely at the point where that Company's notes indicate that the reopener was discussed. (*See* Pet. App. at D-3) Furthermore, the record includes the following documentary evidence contemporaneous with the subsequently reopened negotiations: a) Jewel's letter of December 14, 1983 (notifying Local 881 of Jewel's desire to negotiate "pursuant to our re-opener agreement") [Def. Exh. 32]; b) sign-in sheets from negotiating sessions clearly headlined "Neg. L. 881 — Econ. Reopener" [Def. Exh. 9-11]; and c) a report

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[1] Respondents erroneously urge that this Petition addresses an interlocutory question and also raises a jurisdictional issue. The underlying decision determining liability here is a final order ripe for review. *See, e.g., Airline Pilots v. O'Neill*, 449 U.S. ___, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991); Stern, Gressman, Shapirio, *Supreme Court Practice*, 41, 123-124 (6th Ed. 1986).

from UFCW International official Peter Voeller reporting that he had conferred with the Local 881 officers and that "[a]pparently, an 'agreement' for a reopener was reached, although not reduced to writing, during the last contract negotiations between Jewel and Local 881." (Pet. App. at D-11)

5. There is no basis in the record for Respondents' assertion (p. 2) that when Jewel contacted Local 881 in December 1983 about an economic reopener, "[t]he Union thought the meetings related to Jewel's request for a mid-term contract concession" rather than Jewel's exercise of a power to reopen the contract. Jewel's December 14 letter and the Voeller report make it clear that the Union thought no such thing.

6. Respondents contend (p. 5) that Petitioner has not argued that *Merk II* has significant nationwide precedential value. This is a puzzling assertion, which ignores the following arguments made by Petitioner: (a) *Merk II* "perverts 'national labor policy'" and "significantly increases the risks of instability and bargaining impasses leading to strikes" (Petition at 5); (b) *Merk II* threatens the interests of unions, employers and employees by inviting judicial interference with the collective bargaining process and effectively requiring employer and judicial policing of the details of union ratification procedures (Petition at 9); and (c) *Merk II* threatens "the flexibility and problem-solving capacity of collective bargaining" by creating uncertainties as to ultimate enforceability of various good faith oral and written side agreements (*i.e.*, enforceability may depend upon whether a court subsequently feels that the subject matter of the agreement was "fundamental") (Petition at 14).

7. Contrary to Respondent's bland assurances of *Merk II*'s limited precedential effect, the approach in *Merk II* would work substantial mischief in frequent and nationwide situations. It would put at risk any and all provisions of a bargain not explicitly disclosed to members during ratification. Furthermore, even if a provision is disclosed to members before the contract is ratified, the *Merk II* rationale would presumably permit a ratified deal to be undone if a dissident individual or group could later convince a court that such disclosure had been misleading or incomplete. And, as in *Merk II*, the court which engages in this "Monday

morning quarterbacking" may do so years after the pertinent negotiations and ratification.

8. Respondents attack a straw man, urging (p. 10) that *Ackley v. Western Conference of Teamsters*, Nos. 90-55438, 90-55702 (9th Cir. February 21, 1992) (which they concede realistically describes the information gap between union negotiators and members) does not hold that there is a federal labor policy "favoring clandestine agreements." Federal law does not *favor* such agreements, but neither does it nullify them. Indeed, federal law does not mandate any ratification or disclosure requirements at all. Typically, ratification vel non depends on the provisions of a union's constitution. Furthermore, federal labor policy contemplates pragmatic and effective collective bargaining. "Real world" negotiations often require supplemental agreements – oral or written – in order to reach settlements and avoid strikes. Federal labor policy permits such flexibility and insulates good faith collective bargains from attacks based upon claims of defects in the union ratification process.[2]

9. Respondents' assertion (p. 10) that *Ackley* is not in conflict with *Merk II* completely ignores two important aspects of the approach taken by the court in *Ackley*. First, it presented a comprehensive framework for dealing with union breaches of its ratification obligation under union constitutions. (Pet. App. at 0-25) Second, *Ackley* focused not on contract nullification but on an action against the union under Section 301 of the Labor Management Relations Act ("LMRA") as the primary remedy for such breaches. (Pet. App. at 0-25)

10. *Ackley* aside, Respondents, although denying any inter-circuit conflict (p. 13), do not even address the cases referred to on pp. 15-16 of Petitioner's Brief, showing the existence of such a conflict.

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[2] Respondents (p. 10) accuse Jewel of having "the temerity to mislead this Court" by relying on *Ackley*. Petitioner strongly objects to that scandalous accusation. The petition on p. 14-15 sets forth the differences between the two cases. Instead of attempting to convince this Court by reasoned argument that these differences rob *Ackley* of persuasive force in the case at bar, Respondents resort to an unsubstantiated and unwarranted charge.

11. Respondents quarrel (p. 7) with Judge Easterbrook's assertion that *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945) has "vanished without a trace" as authority for the proposition that federal labor law is hostile to unwritten agreements. Respondents rely on a few district court and state court cases and, principally, on the NLRB's decision in *NDK Corp.*, 278 N.L.R.B. 1035 (1986). In *NDK*, the Board accepted the Administrative Law Judge's statement that national labor policy requires that evidence of oral agreements be unavailing to vary the terms of a written collective bargaining agreement. The Board based its ruling "solely on the rationale of *Gatliff Coal*." *Id.* at 1035.

But what was the "rationale of *Gatliff Coal*" and is it valid today? There the Sixth Circuit adopted a Kentucky district court opinion, declaring that the National Labor Relations Act ("NLRA") "contemplates that a collective bargaining agreement be in writing," so that the Act "clearly precludes . . . reliance upon the prior or contemporaneous oral agreement. . . ." 152 F.2d at 56. *Gatliff* was, however, decided long before Section 301 of the LMRA authorized the federal courts to fashion a body of substantive law for the enforcement of collective bargaining agreements. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957). The later evolution of federal common law has relegated "the rationale of *Gatliff Coal*" to the dustbin of history. In 1952, the Sixth Circuit itself rejected *Gatliff's* premise regarding oral agreements. In *Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers Union of North America*, 193 F.2d 209 (6th Cir. 1952), that court declared:

> We do not agree with appellees' contention that the [NLRA] requires the collective bargaining agreement to be reduced to writing and signed in order to be valid. The Act does not so state. In *H.J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514, 61 S.Ct. 320, 85 L.Ed. 309 and *Cox v. Gatliff Coal Co.*, D.C., 59 F.Supp. 882, affirmed 6th Cir., 152 F.2d 52, it was stated that the Act contemplated that a collective bargaining agreement be in writing. Since those decisions, the Act has been amended by the [LMRA] of 1947, by which collective bargaining was defined as including "the execution

> of a written contract incorporating any agreement reached if requested by either party". Section 158(d), Title 29 U.S.C.A. In our opinion, this contemplates valid oral agreements where neither party requests a written instrument.

193 F.2d at 214.

Furthermore, in *Merk II*, even the Seventh Circuit in effect rejected the basic premise of *Gatliff*, declaring (Pet. App. at B-7) that the oral reopener became an enforceable part of the collective bargaining agreement. That declaration is correct but its incompatibility with *Gatliff's* premise is a source of further confusion warranting review by this Court.

12. With respect to the duty of fair representation, the briefs in opposition rely on two assertions: a) at the time of the settlement, the Union owed no duty of fair representation to the individual Respondents because they were no longer employees of Jewel; and b) the individual Respondents did not "assent" to the Union's representation of them in the settlement negotiations with Jewel.

13. Contrary to both briefs in opposition, neither *Allied Chemical v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), nor *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985) *cert denied*, 471 U.S. 1102 (1985) supports the conclusion that the Union's duty of fair representation ended when a grievant's employment with Jewel ended. *Pittsburgh Plate* presented the question of whether an employer could increase retirees' benefits prospectively without first bargaining with the union. Here, the issue is whether a union may bind former employees by its settlement of a grievance that arose *during their employment*, that is based on the provisions of a collective bargaining agreement and that is covered by the agreement's grievance arbitration processes.

14. Both briefs in opposition ignore the basic purposes of this Court's decisions in *Pennsylvania Railroad v. Day*, 360 U.S. 548 (1959) and *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965); that is, to channel the grievances of former employees into applicable grievance arbitration procedures and to avoid the

conflicting results, expense and destablization that parallel or alternative procedures could generate. Furthermore, *Maddox* not only upheld the exclusivity of the grievance arbitration process with respect to former employees but made it clear that the duty of fair representation was a corollary of the union's authority as exclusive bargaining representative. *See Maddox*, 379 U.S. at 653 and 657. As this Court recently emphasized in *Breininger v. Sheet Metal Workers*, 493 U.S. 67, 87 (1989) (which involved a hiring hall), "[t]he key [to the duty of fair representation] is that the union is administering a provision of the contract...."

15. *Alpha Portland* clearly is distinguishable from this case. *Alpha Portland* involved retirees, who held a unique place in the collective bargaining process and who were covered by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, *et seq.*[3] Here, former employees are complaining about the settlement of a grievance which was filed on their behalf by their union. Former employees frequently make claims arising from their former employment which are covered by a collective bargaining agreement. Accordingly, it would be desirable for this Court to grant this Petition and to resolve the tensions that exist among *Alpha Portland, Day,* and *Maddox*.

16. The Respondents suggest (p. 24) that review is not necessary because these tensions can be resolved by holding that distinct groups with conflicting interests are not subject to a union's exclusive authority or to the grievance arbitration process. Such an approach ignores that the duty of fair representation contemplates the existence of conflicts of interest among members of a bargaining unit and that the duty requires the union to deal fairly with such conflicts. Indeed, the sharper the conflict, the more manifest is the need for the duty. The Respondents' approach would permit any distinct minority to bypass the grievance arbitration process and would deny them the protection of the duty of fair representation as well. The Respondents' argument does not implicate only a narrow fact situation but

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[3] ERISA declares a policy of providing participants with "ready access to federal courts." See *Alpha* 752 F.2d at 1300. This policy sharply contrasts with the preference for the parties' dispute-settling mechanisms embodied in §203(d) of the LMRA, 29 U.S.C. § 173(d).

strikes at the fundamentals of national labor policy fashioned by this Court.

17. Respondent Union urges that Jewel "waived" the contention that the individual Respondents assented to the Union's representation by their failure to disavow the Union's processing of the grievance on their behalf. (P. 7) Jewel asserts that no such waiver occurred.[4]

18. Respondent Union erroneously asserts that *Koshatka v. Philadelphia Newspapers, Inc.* 762 F.2d 329 (3d Cir. 1985) is distinguishable from this case because the grievant therein voluntarily filed a grievance. The individual Respondents did so here as well, through their exclusive representative (Pet. App. at L-1). More importantly, the duty of fair representation does not hinge on the voluntary filing of a grievance. Rather, "[a] union's assumption of the tasks of representation is one of the bases upon which the duty of fair representation can arise." *Koshatka* at 335.

19. Respondent Union misapprehends the applicability of *O'Neill* to this case. Respondent Union cites *O'Neill* (P. 11) for the proposition that the *existence* of a duty of fair representation is determined by the relationship of the parties at the time of the alleged violation of the duty. However, there was no question in *O'Neill* that the duty of fair representation existed; rather, the issue was whether it had been breached, an issue not yet raised in this case.

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[4] Jewel has raised the issue of assent on numerous occasions from the outset of this litigation. *See e.g.* Jewel's Reply Brief in Support of Motion to Dismiss Count I at P5; Jewel's brief before the Seventh Circuit in *Merk I* at pp. 20, 24-27; and Jewel's Petition for Reconsideration in *Merk I* at pp. 8, 10. Petitioner has also argued throughout that the individual Respondents' assent is, of necessity, implied from their employment under the collective bargaining agreement.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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